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# THE CANADIAN LAW TIMES.

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JANUARY, 1899.

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## EXTRA-TERRITORIAL CRIMINAL LEGISLATION OF CANADA.

THE line of demarcation between the legislative powers and functions of the Dominion and those appertaining to the Provinces, under the British North America Act, is now upon many points clearly defined. During the thirty-one years which have elapsed since Confederation, the Judicial Committee has been frequently called upon to decide whether jurisdiction over various subjects of legislation belonged to the Parliament of Canada or to the Provincial Legislatures. This series of judgments has served to dispel many doubts and uncertainties as to the scope of "provincial rights" in the legislative field. On the other hand no case has yet come before this tribunal of last resort in which the validity of any statute, Dominion or Provincial, has been questioned upon the ground that it invaded the domain of the Imperial Parliament, though Canadian statutes have been adversely dealt with by the Imperial Government because ultra vires of a colonial legislature. Even in Canadian reports expressions of judicial opinion upon this subject are rarely to be found. It would be unreasonable, however, to expect that our Parliament will always so restrict its legislation in subject and area as never to enter upon debatable ground, or that the power of disallowance by the Imperial Government will be used in every instance to remove from our statute books enactments of questionable validity. Indeed, in more than one instance, statutory provisions of doubtful legal efficacy have been enacted in Canada and not disallowed in London. Led on by our aspirations for national

existence as "a partner with Great Britain in the Empire"—a phrase at present complimentary rather than legally precise—we shall be tempted to strain to the utmost our powers of self-government; and students and exponents of our constitutional law will be required to consider how far this tendency can be permitted to carry us in legislation, compatibly with our remaining subject to the provisions of the British North America Act.

Upon the subject of the present article, though scarcely *primae impressionis*, opinions having been expressed upon it by some of our most eminent Judges, by Imperial Crown law officers, and by several writers, English and Canadian, the law cannot be said to be at all settled or certain. Not only have the decisions reached been conflicting, but the reasons upon which several learned Judges have based their judgments render these inconclusive as authorities upon the broad constitutional question. Nevertheless, judicial utterances, and the commentaries of publicists of repute—authorities of established value upon matters of international law (*a*), and of recognized weight upon constitutional questions—will greatly aid us in seeking to ascertain the true limitations of the legislative powers of our Parliament, where they border on those of the Imperial Parliament.

Has the Dominion Parliament jurisdiction to constitute the act of a Canadian done abroad a criminal offence punishable upon his return to Canada? Thus may the question be stated. It should be premised that by "Canadian" is meant a British subject permanently resident in Canada, and who retains his character as a British subject when abroad (*b*). Moreover, the scope of the present article is confined to legislation strictly criminal. In purely civil matters, if not also in those of a quasi penal nature, other rules and principles prevail, and many questions arise as to the applicability in particular cases of the *lex domicilii*, the *lex fori* or the *lex loci*. While the difference in character, and in some of their incidents and effects, between statutes constituting certain acts crimes, and providing for their punishment as such, and

(*a*) *Regina v. Keyn*, 2 Ex. D. at pp. 68-70, 122 and 132.

(*b*) See R. S. C. cap. 113, secs. 4-6 and 15, and Schedule Form "C."

enactments affixing to the doing of certain other acts a penalty to be enforced by or in a civil action (c) is well recognized, it is upon principle difficult to understand how, legislation of both classes being designed to regulate the personal conduct of those subject to it, statutes of the latter class expressly extended by our Parliament to acts of Canadians done abroad can be valid, if those of the former, likewise extended, are upon this ground to be held void (d). As examples of such penal, as distinguished from criminal, legislation, reference may be made to the Insolvent Act, 1875 (e), and the Alien Labour Act, 1897 (f). Perhaps the Courts in dealing with this latter statute may adopt, as did some of the Judges in dealing with the Insolvent Act, a "construction to save jurisdiction." But any discussion of this subject would lead us too far afield.

While desiring to avoid too rudimental an enquiry, the character of the question under consideration renders inevitable a somewhat pedantic reference to first principles. That these may be present to our minds it may be advisable to state them at the outset.

To whatever actual or practical restrictions they may be subject (g), there is no constitutional limitation upon the powers of the Imperial Parliament (h); the validity of its statutes, though affecting foreigners abroad, and such as would, upon well known principles of international law, be regarded as nullities by foreign tribunals (i), cannot be questioned by any Court, British or Colonial (j). Legislation of

(c) *Shields v. Peak*, per Osler, J., 31 C.P. 116-122; per Ritchie, C.J., 8 S. C. R. at p. 590.

(d) *Ibid.*, per Wilson, C.J., 31 C.P. at p. 126; per Strong, J., 8 S.C. R. at p. 594.

(e) 38 Vict. cap. 16. secs. 136-7.

(f) 60 & 61 Vict. cap. 11, sec. 1.

(g) *Dicey on the Constitution*, 4th ed. pp. 68, 73; *Adam v. B. & F. S. Co.*, L. R. (1898) 2 Q. B. at p. 432-3; *The Zollverein*, 1 Sw. Adm. 96; but see *Bonham's Case*, 8 Co. Rep. 118 a; and discussion in *Dwarris on Statutes*, 2nd ed. at p. 480, *et seq.*

(h) *May on Parliamentary Practice*, 10th ed. p. 37; 4 Inst. 36.

(i) Per Strong, C.J., 27 S. C. R. 471; *Story's Conflict of Laws*, 8th ed. sec. 540; *Hall's Int. Law*, 3rd ed. p. 209; *Jefferys v. Boosey*, 4 H. L. C. at p. 926.

(j) *Niboyet v. Nibovet*, L. R. 4 P. D. 20; *Reg. v. Keyn*, 2 Ex. D. at pp. 152, 160, 207, 220; *Dicey on the Constitution*, 4th ed. p. 85; *Maxwell on Statutes*, 3rd ed. 207.

this class, not uncommon in other European countries (*k*), is unknown in the history of English jurisprudence (*l*).

The British Parliament has the right, undoubted by English jurists, "to legislate for its subjects all the world over" (*m*); and this power, at all events when confined to the enactment of legislation intended to be invoked only against a subject returned within the realm, and not negative of the primary jurisdiction of the state wherein such subject may be sojourning (*n*), as well as the jurisdiction of Parliament over foreigners commorant in British dominions, is incontestable according to the law of nations (*o*).

That the British Parliament could vest in colonial legislatures powers co-equal with its own is unquestioned and unquestionable (*p*), as that, in creating such bodies, it may restrict the powers conferred as it sees fit. Whatever powers a colonial Legislature has, it derives from royal charter or enactments of the Imperial Parliament bestowing such powers, and in determining their extent Courts of Justice "can only properly do so by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted" (*q*). However extensive the powers given to a colonial Legislature, the Imperial Parliament always retains a paramount jurisdiction, and may at any time enact laws binding upon, or may alter and (in theory at least) may destroy the self-governing powers of any British dependency (*r*). Therefore, legislation of any colony repugnant to Imperial statutory provisions

(*k*) Hall's Int. Law, 3rd ed. at pp. 206-8.

(*l*) Reg. v. Lewis, 1 Dearsley & B. C. C. 182; Rex v. Depardo, 1 Taunt. 26; Forsyth's Constitutional Law, 223; see also Halleck's Int. Law, 3rd ed. p. 385, and 6 & 7 Vict. (Imp.) cap. 94.

(*m*) The Zollverein, 1 Sw. Adm. 96; Shields v. Peak, per Strong, J., 8 S. C. R. at p. 596; Maxwell on Statutes, 3rd ed. p. 195; Halleck on Int. Law (1893), at pp. 206-7. See, however, Story on Conflict of Laws, Sec. 539.

(*n*) Story on Conflict of Laws, sec. 540; Reg. v. Sawyer, 2 C. & K. 101; Reg. v. Azzopardi, 1 C. & K. 203; Hall on Int. Law, 3rd ed. at p. 252.

(*o*) Reg. v. Keyn, 2 Ex. D., per Cockburn, C.J., at p. 160; per Sir R. Phillimore, at p. 71; Schooner Exchange v. McFadden, *et al.*, 7 Cranch (U.S.) at p. 144.

(*p*) Per Strong, C.J., 27 S. C. R. at p. 473.

(*q*) Reg. v. Burah, 3 App. Ca. at p. 904; Fielding v. Thomas, L. R. (1896) A. C. 609.

(*r*) Dicey on the Constitution, 4th ed. 107.



extending to such colony is void, by reason of the inherent subordination of the colonial powers, as well as under the terms of an express Imperial enactment of a declaratory and definitive character (s).

It follows that "exclusive" powers conferred on the Dominion Parliament are exclusive only as against any right of interference by Provincial Legislatures, which are likewise given powers "exclusive" of Dominion rights (t), and that in neither case do such powers exclude the jurisdiction of the Imperial Parliament, which runs paramount (u). Unlike Imperial statutes Dominion legislation (apart from any question whether it trenches upon the domain exclusively provincial) is liable to be avoided by our Courts (v), not only, as put by the learned Chancellor of Ontario (w), if it is open to attack as "repugnant to Imperial legislation," or "if it transcends the powers conferred, or invades the limits prescribed by the B. N. A. Act," but (assuming express limitations only to be within the purview of this language) with all deference to this learned Judge, we must add, also if such legislation disregards the restrictions necessarily implied from "the inherent condition of a dependency" (x), if it is "inconsistent with the powers committed to a colony" (y).

Lest their importance and effect should seem to be underestimated, allusion should be made to the numerous decisions establishing beyond controversy the proposition that, when acting within the constitutional limits above outlined, the Canadian Parliament "has and was intended to have plenary powers of legislation as large and of the same nature as the Imperial Parliament itself" (z).

(s) Colonial Laws Validity Act (1865), 28 & 29 Vict. cap. 63.

(t) B. N. A. Act, secs. 91 and 92; *Russell v. The Queen*, 7 App. Ca. at p. 836, *et seq.*; *Citizens' Ins. Co. v. Parsons*, 7 App. Ca. 96; *Valin v. Langlois*, 5 App. Ca. p. 118, *et seq.*; *Dow v. Black*, L. R. 6 P. C. 272.

(u) *Smiles v. Belford*, 1 App. R. 447-8; *Reg. v. Coll. of Physicians*, 44 U. C. R. at p. 576.

(v) *Reg. v. Burah*, 8 App. Ca. at p. 904.

(w) *Reg. v. Brierley*, 14 Ont. R. at p. 531. See p. 545, per Ferguson, J. See *Reg. v. Kerr*, Berton's N. B. S. C. R. 2nd ed. (Stockton), p. 557.

(x) Per Wilson, J., *Reg. v. Taylor*, 36 U. C. R. p. 191; per Proudfoot, V. C., *Int. Bridge Co. v. C. S. Ry.*, 28 Grant at p. 134.

(y) *Macleod v. Attorney General for N. S. W.*, L. R. (1891) A. C. p. 457.

(z) *Reg. v. Burah*, L. R. 8 App. Ca. 904; *Powell v. Apollo Candle Co.*, 10 App. Ca. 282; *Riel v. Reginam*, 10 App. Ca. 675.

The legislative powers of the Dominion Parliament are found in section 91 of the B. N. A. Act, which, so far as material to the present enquiry, reads as follows :

91. "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say : s.-s. 25, Naturalization and Aliens; s.-s. 26, Marriage and Divorce; s.-s. 27, The Criminal Law, except the Constitution of Courts of Criminal jurisdiction, but including the procedure in Criminal matters."

The Judicial Committee, speaking through Lord Chancellor Halsbury, of the power to legislate "for the peace, order and good government of Canada," thus indicates its comprehensive character: "The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to" (a).

The B. N. A. Act contains no express restrictions upon these wide powers. Even the paramount jurisdiction of the Imperial Parliament is not in terms safe-guarded as it was in the Quebec Resolutions (b). To expressly declare or define limitations such as this, necessarily resulting from our status as a dependency, was probably thought to be superfluous; or perhaps it was deemed the wiser course to avoid the danger of omitting some proper or desirable restriction in an attempt to state them completely. Yet however obvious it may seem that some such restrictions must exist, there is room for much discussion as to how far they narrow the scope of powers otherwise unlimited. Indeed, Lord Selborne has said, "If what has been done in legislation is

(a) *Riel v. Reginam*, 10 App. Ca. at p. 678.

(b) Resolution 29 of 1864.

within the general scope of the affirmative words which give the power, and if it violates no express conditions or restrictions by which that power is limited . . . it is not for any Court of Justice to enquire further or to enlarge constructively those conditions or restrictions" (c). His Lordship was here dealing with the powers of the Indian Legislature, which are "expressly limited" by the statute creating that body, and his language is referable to the well known rule that statutory enumeration is regarded as exhaustive. While not an authority for holding, as some learned Judges seem disposed to do, that because no limitation is expressed none exists (d), this language of the Lord Chancellor Selborne, taken in conjunction with the cases in which the plenary character of the legislative powers of colonial legislatures has been time and again affirmed, imperatively enjoins extreme caution in defining the extent of any implied restrictions upon such powers.

In the judgment of the Privy Council in *Bank of Toronto v. Lambe* (e), we find it stated that "the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the Provincial Legislatures rests with the Parliament." This, however, only implies that all legislative powers "committed to a colony" are vested in either the one legislative body or the other.

We shall now briefly examine the few available authorities bearing directly upon the immediate question under discussion, with a view to ascertaining how far an analysis of the reasons, upon which are based the various opinions expressed, will aid us to a satisfactory solution of the problem, first taking up those affirming the existence of the disputed power, and afterwards those in which it is denied.

In *Reg. v. Brierly* (f), a case before the Chancery Divisional Court, in which the validity of the Dominion legislation respecting bigamy, so far as it affected second marriages

(c) *Reg. v. Burah*, 3 App. Ca. at p. 904.

(d) *Reg. v. Brierly*, 14 Ont. R. at p. 532; re Criminal Code, Bigamy Sections, 27 S. C. R. at p. 490. See *Cox v. Hakes*, 15 App. Ca. at pp. 517-8.

(e) 12 App. Ca. 588.

(f) 14 Ont. R. 525.

solemnized abroad was in question, we find the first (*g*) express decision that the Parliament of Canada has power to legislate for the punishment in Canada of a crime committed by a Canadian out of Canada.

The material parts of this bigamy legislation are as follows: "IV. Everyone who being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony and liable to seven years' imprisonment.

"2. Nothing in this section contained shall extend to (*a*) Any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty, resident in Canada, leaving the same with intent to commit the offence" (*h*).

The principal judgment in *Reg. v. Brierly* (*f*), delivered by the Chancellor, is, as Mr. Clement says (*i*), "a clear marshalling of all that can be urged in support of the jurisdiction" for which it is a distinct authority. Its reasoning may be analysed with advantage.

That this particular legislation, as stated by both the Chancellor and Mr. Justice Ferguson, is "for the peace, order and good government of Canada," and is in respect of "marriage and divorce," and, therefore, *prima facie*, within the powers conferred by the B. N. A. Act, if these be absolutely unlimited, appears to be an incontrovertible proposition, especially since Parliament enjoys "the widest discretion of enactment for the attainment of the objects pointed to" (*j*). The Chancellor's further propositions—that this Dominion law is not repugnant to any Imperial legislation; that it does not "interfere with the right of any foreign country to punish offences committed in its precincts"; that it does not contravene any limitation upon legislative powers actually expressed

(*g*) In *Reg. v. Pierce*, 13 Ont. R. 226, the validity of the legislation was not questioned. See argument of Mr. J. E. (now Mr. Justice) Rose, and of Mr. Bethune, Q.C., in *Peak v. Shields*, 31 C. P. at pp. 114-115. In *Reg. v. McQuiggan*, 2 L. C. R. 340, this question is only alluded to in argument.

(*h*) R. S. C. cap. 161.

(*i*) Clement on the Constitution, p. 191.

(*j*) *Riel v. Reginam*, 10 App. Ca. at p. 678.

in the B. N. A. Act; that within the area of its powers Parliament is supreme; and that an offender may well be amenable to more than one jurisdiction for the same crime (*k*), and yet not be liable to be harassed by a second prosecution in any British Court (*l*)—are no doubt sound statements of law, but, it is deferentially submitted, they are by no means conclusive upon the question at issue. When the learned Judge proceeds, however, to assert that allegiance is due by Canadians at home and abroad to the Queen as part of the Parliament of Canada (*m*) he enters upon debatable ground. Though it should be conceded that such allegiance is due to Her Majesty by a Canadian while in Canada (*n*), that the Canadian who has gone beyond the three-mile limit of our coast waters still owes this duty to the Queen as part of the Government of Canada, or in any other capacity than as Sovereign of the United Kingdom, is a proposition gravely controverted by eminent judges and jurists. Mr. Justice Ferguson barely alludes to the adverse contention upon this point, expressing no opinion of his own.

“Quoad Canada, and as to British subjects resident here, the Parliament of Canada has the same authority as that possessed by the Imperial Parliament with reference to British subjects throughout the realm. With regard to the large range of subjects committed to its jurisdiction by the B. N. A. Act, Canada has powers of legislation co-ordinate with those of the Imperial Parliament” (*o*).

In this language, which sounds the key-note of his judgment, the learned Chancellor takes the broadest possible view of the legislative powers committed to the Dominion Parliament, and for it he cites as authority *Powell v. Apollo Candle Co.* (*p*), and kindred cases therein referred to. How

(*k*) As to this point, see *Reg. v. Anderson*, L. R. 1 C. C. at pp. 165-6; *In re Tivnan*, 5 B. & S. 679.

(*l*) *Phillips v. Eyre*, L. R. 4 Q. B. at pp. 241-2.

(*m*) See, however, *re Lord Bishop of Natal*, 3 Moore, P. C. (N.S.) at p. 148.

(*n*) Meredith, Q.C. (now Sir William Meredith, C.J.), argued that “no allegiance is due to the sovereign as represented by the Dominion Government,” 14 Ont. R. at p. 527.

(*o*) 14 Ont. R. at p. 533.

(*p*) 10 App. Ca. 282.

far that decision sustains his view may be understood from the following statement. The Powell case involved the validity of a customs ordinance of New South Wales operative only within that colony, which was attacked on the familiar ground that the Constitution Act (*q*) conferred legislative powers only upon the Assembly which had attempted to delegate such powers to the Governor—a delegation claimed to be ultra vires. The Legislature was empowered “to make laws for the peace, welfare and good government of the said colony in all cases whatsoever.” In combating the idea that a colonial legislature is a mere delegate of the Imperial Parliament, the Judicial Committee says: “A Colonial Legislature is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate.” The cases cited are *Hodge v. The Queen* (*r*), where exactly the same doctrine is laid down with respect to the Ontario Legislature, and *Reg. v. Burah* (*s*), already adverted to. Can these decisions be taken as sustaining the proposition so broadly put by the learned Chancellor of Ontario in the language just quoted? The Chancellor adds that there is, in the Dominion law against bigamy, “no assumption of extra-territorial jurisdiction to be put into operation outside of Canada” (*t*). This is no doubt the case; and Mr. Roscoe in his well known work on Criminal Evidence says that because of this fact “the question becomes one entirely of municipal law” (*u*). Legislation for the punishment in Canada of an offence committed abroad by a Canadian is certainly distinguishable from legislation designed to be actively enforced outside Canadian territory and the matter may thus be removed from the sphere of international law; yet the constitutional question remains, whether, even thus narrowed, the jurisdiction claimed appertains to a colonial Legislature, or only to the paramount and sovereign Imperial Parliament.

(*q*) 18 & 19 Vict. (Imp.) cap. 54, sec. 1.

(*r*) 9 App. Ca. 132.

(*s*) 3 App. Ca. 904.

(*t*) See Clement on the Constitution, at p. 192.

(*u*) 11th ed. at p. 240.



The Chancellor and Mr. Justice Ferguson (*v*) both find in the history of our bigamy legislation, evidence of its having been "ratified by the express sanction of the Imperial Parliament." Of course any conclusion based on this ground would not attribute to our Parliament independent extra-territorial jurisdiction. Such, briefly, are the grounds of judgment in *Reg. v. Brierly*. Mr. Justice Robertson concurred in the judgment of his brother Judges.

In 1897 the Dominion Government called upon the Supreme Court of Canada to determine whether Parliament had authority to enact the bigamy sections of the Criminal Code (*w*). That Court (Strong, C.J., dissenting, and Taschereau, J., not sitting), held these enactments to be within the competence of Parliament (*x*). They are in effect the same as the sections from the R. S. C. above quoted.

Mr. Justice Gwynne would ascribe to the Dominion of Canada ("a name theretofore unknown among the dependencies of the British Empire") "a political status infinitely superior to that of a colony—a national existence, in fact, as an integral portion of the British Empire," introduced "into the family of nations," and legislative powers over Canadians co-extensive with those of the Imperial Parliament over all British subjects. The learned Judge lays great stress upon the recital in the preamble to the B. N. A. Act, that the confederating provinces desired "a constitution similar in principle to that of the United Kingdom." Apart from the fact that "similar" means "alike, but not completely identical" (*y*), "in some respects identical" (*z*), and

(*v*) 14 Ont. R. at pp. 536-7 and 544.

(*w*) 275. "Bigamy is, (*a*) The act of a person who, being married, goes through a form of marriage with any other person in any other part of the world; or

"(*b*) The act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or

"(*c*) The act of a person who goes through a form of marriage with more than one person simultaneously or on the same day.

"4 No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage."

(*x*) 27 S. C. R. 461.

(*y*) Standard Dictionary.

(*z*) Century Dictionary.

that even the similarity sought is to be "in principle" only, is not the learned Judge attributing entirely too great an effect to a mere preamble (a)? "The preamble can never enlarge: it cannot confer any powers per se." Mr. Justice Girouard adopts the reasons given by the Chancellor in *Reg. v. Brierly* for upholding the validity of the legislation in question, adding that Canada occupies a semi-sovereign position, and that our Parliament has all the powers of a legislature of an independent state over matters upon which the Imperial Parliament has not legislated for us. But the jurists he quotes are dealing rather with states which have subjected themselves by treaty to the protectorate or partial control of other states. He, too, relies much on the preamble of the B. N. A. Act, and the use of the name "Dominion." Our Parliament, he concludes, is "omnipotent so long as its legislation is not repugnant to that of the Empire."

Mr. Justice King bases his judgment entirely on the fact that "the leaving this country with an intent to do a certain act" is "a material part of what is prohibited," and that part being committed in Canada, he maintains, gives jurisdiction to "provide for the punishment of the whole offence here" (b). Chief Justice Strong (c) argues with much force that this is a strained view of the statute, that "the criminal act is the marriage without the jurisdiction," "the substantive and principal act," the intent when leaving Canada being merely a condition. As an instance of leaving Canada with a certain intent alone constituting a crime we have the provision of the Code against "leaving Canada with intent to engage in a prize fight without the limits thereof" (d). The Chief Justice further maintains that "as the celebration of the marriage abroad is a necessary ingredient of the crime," the compound criminal offence

(a) Maxwell on Statutes, 3rd ed pp. 59, 63 and 69; Dwarris on Statutes, 2nd ed. p. 503; Story on the Constitution, 5th ed. sec. 462.

(b) Sir John Thompson said in the House of Commons when the Bigamy sections of the Code were under discussion, "We make it an offence to leave Canada for the purpose of committing that offence (Bigamy) in another part of the world, that being the full extent of our power." Hansard, June 3rd, 1892. p. 3321.

(c) 27 S. C. R. at p. 466.

(d) Criminal Code (1892), sec. 96.

could not be dealt with by a Legislature unable to make an act committed without Canada criminal (e). This legislation is not on this ground distinguishable from what the Privy Council in the Macleod case, referred to below, clearly holds to be ultra vires. Whatever may be the correct view upon this point, it is obvious that the judgment of Mr. Justice King, grounded as it is, is not authority for an affirmative answer to our question, though he does add that "a British subject domiciled here and only temporarily absent, might well continue to owe to Her Majesty in relation to her Government of Canada an obligation to refrain from the completion of the prohibited conduct whilst absent without any *animus manendi*." Mr. Justice Sedgewick concurs in this judgment. Only two Supreme Court Judges, therefore, uphold the right of the Dominion Parliament to declare criminal acts of Canadians done out of Canada, Gwynne and Girouard, JJ. This case was presented ex parte by the Deputy Minister of Justice, whose argument was of course directed to upholding the validity of the legislation in question.

There are but few expressions of opinion by Crown Law officers in favour of colonial extra-territorial jurisdiction. Sir Robert Phillimore, when Queen's Advocate in 1867, appears to have thought, contrary to the view taken by Sir Fitzroy Kelly and Sir Hugh Cairns, that the Indian Legislature had some such inherent power (f). Sir J. Harding, Queen's Advocate, Sir A. E. Cockburn, Attorney-General, and Sir R. Bethell, Solicitor-General, dealing with a case from British Guiana in 1855, said, "we conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits, three miles from the shore, or, at the utmost, can only do this over persons domiciled in the colony who may offend against its ordinances even beyond those limits, but not over other persons" (g). The Chief Justice of Can-

(e) 27 S. C. R. at p. 470. But see Bishop's Criminal Law, 8th ed. sec. 112, s.-s. 4. and sec. 116. Compare *Reg. v. Hennessy*, 35 U. C. R. 603; *Reg. v. Ellis*, W. N. (1898) p. 162.

(f) Forsyth's Constitutional Law, p. 17.

(g) Forsyth's Constitutional Law, at p. 24..

ada speaks of this latter opinion (*h*) as "uncertain and indeterminate," and "not fully considered." He quarrels with the use of the word "domiciled" in connection with criminal law. "Domiciled" was no doubt used as equivalent to "permanently resident."

Finally Mr. Lefroy says, in the addenda to his work on Legislative Power in Canada (*i*), that the decision of the Supreme Court upon the validity of the Bigamy Sections of the Criminal Code, "confirms the conclusions arrived at in the text" (pp. 333-8).

We must now look at the authorities upon the other side of the question.

In *Shields v. Peak* (*j*), the validity of section 136 of the Dominion Insolvent Act of 1875 was questioned, on the ground that it purported to make certain fraudulent acts, wherever committed, crimes punishable in Canada. Strong, J., indicates obiter, his view that Canadians are liable to be affected by no legislation regulating their personal conduct without the limits of the Dominion, save such as may be enacted by the Imperial Legislature. And Henry, J., and Taschereau, J., doubt the power of our Parliament "to legislate for the punishment of fraud (committed) out of the country." Patterson, J.A., in the Court of Appeal, was inclined to the same view, and Wilson, C.J., in the Court of Common Pleas expressed this opinion very broadly.

*Macleod v. The Attorney-General for N. S. W.* (*k*), was an appeal to the Judicial Committee from the colonial Supreme Court by a domiciled Scotchman (*l*) convicted in N. S. W. of bigamy under an enactment that "whosoever, being married, marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years" (*m*). The bigamous marriage had been solemnized in Missouri. The Constitution Act of New South Wales has already been

(*h*) 27 S. C. R. at pp. 476-7.

(*i*) At p. xiv.

(*j*) 8 S. C. R. 579; 6 App. R. 639; 31 C. P. 112.

(*k*) L. R. (1891) A. C. 455.

(*l*) 11 N. S. W. Rep. at p. 225.

(*m*) 46 Vict. No. 17, sec. 54.

referred to (n). Lord Chancellor Halsbury, in delivering the judgment of the Court, first deals with the construction of the words "whosoever" and "wheresoever," and says that, if unlimited in operation, they would render "any person married to any other person, who marries a second time anywhere in the habitable globe, amenable to the criminal jurisdiction of the colony of N. S. W., if he can be caught in that colony" . . . "The colony can have no such jurisdiction." Therefore, presuming against any intention of the legislature to exceed its powers, the Court construes "whosoever being married" as meaning "whosoever being married, and who is amenable at the time of the offence committed, to the jurisdiction of the colony of N. S. W.," and "wheresoever" as meaning "wheresoever in this colony the offence is committed." Their Lordships thus uphold the validity of the Statute while setting aside the conviction. The Lord Chancellor further says: "Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, '*Extra territorium jus dicenti impune non paretur*,' would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys v. Boosey*, expresses the same proposition in very terse language. He says (o): 'The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect.' All crime is local (p). The

(n) *Supra* p. 10.

(o) 4 H. L. C. at p. 926.

(p) See Dr. Woolsey on Int. Law, 5th ed. at pp. 112-4; Hall on Int. Law, at p. 209; *In re Tivnan*, 5 B. & S. at p. 679.

jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was ultra vires of the colonial legislature to pass."

Of course the Lord Chancellor when stating that "all crime is local," and that "the jurisdiction over the crime belongs to the country where the crime is committed," did not intend to deny the power of the Imperial Parliament to legislate for British subjects the world over (*q*). Mr. Justice Girouard thinks that the passage just quoted indicates that if the N. S. W. legislation had been restricted to British subjects permanently resident in the colony, it would not have been invalidated, even though it expressly dealt with offences committed abroad (*r*). But, if it had sufficed, in order to bring the statute within colonial legislative powers, to so narrow the construction of the word "whosoever" would their Lordships have sought unnecessarily (except perhaps for consistency) to restrict the meaning of the word "where-soever," which they say is more difficult? This fact, coupled with the expression, "their jurisdiction is confined within their own territories," seems to indicate their Lordships' opinion to have been that it was essential to the validity of the statute to restrict its operation in both particulars; but, to do so not having been necessary to the decision of the case in hand, this opinion, not directly expressed, is perhaps to be regarded as obiter, and not conclusive of the invalidity of a Canadian statute, confined in its operation to Canadians, though extending to their acts done abroad. Indeed this is admitted by Chief Justice Strong (*s*). The N. S. W. case

(*q*) *Reg. v. Sawyer*, 12 C. & K. 101; *Reg. v. Azzopardi*, 1 C. & R. 203; *The Zollverein*, 1 Sw. Adm. 96; *Lumley v. Gye*, 3 E. & B. at p. 124.

(*r*) 27 S. C. R. at p. 478.

(*s*) 27 S. C. R. at p. 471.

does, however, conclusively establish that language not expressly limited, and, if aught, wider than that used in Section 91 of the B. N. A. Act, must nevertheless, by necessary implication, be construed as conferring only jurisdiction "consistent with the powers committed to a colony." It illustrates the well-established rule that "the words of a statute are to be construed in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view" (*t*). The subject of the B. N. A. Act is a dependency "under the Crown of the United Kingdom": the object was not to create a sovereign state.

The Judges of the Queen's Bench Division (Armour, C.J., and Falconbridge, J.) in *Reg. v. Plowman* (*u*), although the Deputy Attorney-General had directed attention to the important distinction between the Canadian statute and the N. S. W. enactment already mentioned, regarded the judgment of the Judicial Committee as decisive of the invalidity of the Canadian Act. Chief Justice Armour pronounced the judgment as follows:

"The Imperial Parliament could enact that it should be a crime for a British subject to go through a form or ceremony of marriage abroad, but it has not done so. The Dominion Parliament, being a subordinate legislature, has no such power; and that is the effect of the case of *Macleod v. Attorney-General for New South Wales*, which covers this case. The second marriage is the offence, and the Dominion Parliament has no power to legislate about such an offence committed in a foreign country." Mr. Justice Falconbridge concurred.

It is perhaps matter of regret that further time was not taken for the consideration of this case.

In a dissenting judgment, very logical and carefully prepared (if it be permissible to say so), Chief Justice Strong, in the Supreme Court case already referred to (*v*), declares the

(*t*) *Maxwell on Statutes*, 3rd ed. p. 74; *Dwarris on Statutes*, 2nd ed. p. 581; *Cope v. Doherty*, 2 DeG. & J. at pp. 621 and 623-4. But see also *Fordyce v. Brydges*, 1 H. L. C. 1.

(*u*) 25 Ont. R. 656.

(*v*) 27 S. C. R. at p. 464.



Canadian bigamy legislation, so far as it covers marriages solemnized out of Canada, to be ultra vires. His reasons, not already incidentally adverted to, are as follows:

The power of legislation in criminal matters is *prima facie* local, limited to the territory over which the legislature has jurisdiction; "the legislative authority of the Parliament of the United Kingdom to control the personal conduct of the Queen's subjects, irrespective of their locality, depends altogether upon their allegiance, not upon their residence or domicile"; the sovereign Imperial Parliament may confer a power extensive as its own on a colonial legislature; the question whether it has here done so is solely one of construction of section 91, s.-s. 27 of the B. N. A. Act; Canada has no greater legislative powers than those of the smallest colony, given powers of self-government by legislation of the Imperial Parliament similar to the B. N. A. Act (*w*); that every self-governing British dependency should enjoy such extra-territorial powers is inadmissible; personal allegiance is, in the absence of express delegation, matter to be dealt with by the Imperial Parliament, which controls exclusively the acquisition of British nationality; it is therefore clear that the power of legislation conferred by section 91 is confined to offences committed within the Dominion. The observations made in the Macleod case, though obiter, cover extra-territorial legislation identical in terms with the bigamy sections of our Code. If, because of the presumption that criminal legislation is intended to be local, express terms are held requisite by English Courts to extend the operation of "an ordinary criminal law making a new statutory offence" to acts of British subjects done without the Queen's dominions, colonial legislative powers in criminal matters, conferred by a statute not containing such terms, must be construed as restricted to acts done within the colony. Again, acts done in a foreign jurisdiction may always "give rise to international reclamations upon the Imperial Government," and all reasons concur in favour of retaining all matters of international concern in the hands of the Imperial Government.

(*w*) Compare Constitution Acts of N. S. W., and other colonies. See Forsyth, at p. 27.



The two reasons last stated are perhaps the most cogent arguments of the learned Chief Justice. As to the former it may, with all deference, be remarked that learned English judges have said that "necessary inference or implication" (x) drawn from the language, the subject or the object of a statute may suffice to extend its operation not only beyond the realm, but even so as to affect the rights of foreigners. It is asserted that if not essential, it is at least highly desirable to enable our Parliament fully to discharge the duty of legislating "for the peace, order and good-government of Canada," that it should, in respect of some subjects of criminal law, possess extra-territorial jurisdiction over Canadians, and that therefore, it is not an unreasonable implication to infer that its powers were intended to extend to such legislation. The fact that these powers are not in express terms so extended, while affording an extremely strong presumption against an intention that they should be extra-territorial, is not absolutely conclusive. As to the latter ground of the learned Chief Justice, the exercise of the admitted (y) jurisdiction of our parliament over foreigners sojourning in Canada seems more likely "to give rise to international reclamations" than the punishment here of one of our own citizens for an infraction of our law committed in a foreign state. The grounds relied upon in the earlier part of the judgment under review depend largely upon the inference of limitations of powers arising from "the inherent condition of a dependency," a not very satisfactory gauge by which to measure the extent and character of such limitations, though their existence be indisputable. Had Mr. Justice Taschereau been sitting he would probably have concurred with the learned Chief Justice, adhering to his own views expressed in *Shields v. Peak* (z).

*(To be concluded.)*

FRANK A. ANGLIN.

(x) *Reg v. Zulueta*, 1 Car. & K. 215; *Sussex Peerage Case*, 11 Cl. & F. at p. 146; *Santos v. Illidge*, 28 L. J. C. P. 317; overruled on another point; *Jefferys v. Boosey*, 4 H. L. C. at pp. 851, 939 and 970; *Maxwell on Statutes*, 3rd ed. p. 196; *Reg. v. Jameson*, L. R. (1896) 2 Q. B. 425. But see *Niboyet v. Niboyet*, 4 P. D. at pp. 19-20; and *Adam v. B. & F. S. Co.*, L. R. (1893) 2 Q. B. at p. 432.

(y) 27 S. C. R. p. 470.

(z) 8 S. C. R. at p. 600.

## EDITORIAL REVIEW.

**The late Alexander Grant.**

The death of the late Mr. Alexander Grant, for many years Registrar of the Court of Chancery of Upper Canada and Ontario, and afterwards Registrar of the Court of Appeal for Ontario was not unexpected. Mr. Grant had been ailing for some time, and at the ripe age to which he had attained, it was felt that he could not recover. In him we have lost one of the best officials at Osgoode Hall, and a reporter to whom we are indebted for the only extant reports of the Court of Chancery.

Mr. Grant was a man of great ability and well-balanced judgment. He took an intelligent interest in cases argued before the Courts in which he sat as Registrar, and often expressed to practitioners a very mature opinion on them. When Registrar of the Court of Chancery it was his duty to take down all the evidence at trial, and it was necessarily done in longhand, a most laborious piece of work. The introduction of stenographic writers relieved him of this labour. In settling decrees in that Court his ability and experience were of the greatest benefit to practitioners.

In addition to his duties as Registrar he initiated the Reports of Cases decided in the Court of Chancery and known by his name, and carried on his series as his own private venture through twenty-nine volumes for a period of nearly thirty-three years, when the passage of the Judicature Act suggested, and perhaps required, a new system of editing. He then became a Reporter to the Law Society, and was Reporter to the Court of Appeal at the time of his death.

The first case reported in his own series bears date 2nd November, 1849, so that he was actively engaged in reporting for nearly fifty years, a length of service of that kind without, we believe, a parallel in any part of the English speaking world. His own series of Reports themselves

cover a longer period than any other individual Reporter has covered. Though Beaven's Reports number thirty-six volumes (in reality thirty-five, as the last contains but two or three cases and the index) they cover a period of only about twenty-eight years.

It was hoped that his place would have been filled by the appointment of his son, Mr. Charles Grant, a clerk in his office, who, during his father's illness, performed all the duties of the office. Mr. Grant's long services deserved some recognition, and as the public service does not reward its officials very highly, it would have been a gracious act to have recognized them in this way. Not only would the appointment itself have been a gracious one; it would also have been an act of courtesy to the Judges of the Court, who were so sensible of what was due to the family of a man who had performed such a length of service that they made an appeal to the Attorney-General (not officially of course) for his appointment, and it would have been an act of courtesy to the many gentlemen of the Bar who petitioned the Attorney-General for his appointment.

What the exigencies of the Government were we do not know. We can only speak of the requirements of the public service. But we all know by common report that there is a multitude of office seekers in this country whose importunity furnishes their chief, sometimes their only, qualification for recognition. But it was asserted at the time that the appointment of a layman would have been an insult to every lawyer in the Province. As many members of the profession petitioned for his appointment, it might be taken as admitted that they would not have been grievously insulted. If they felt insulted when a baker (a very nice fellow, but a baker, not a barrister) was appointed fresh from the shop to the Registry of a Surrogate Court, they would not have felt more deeply the insult of appointing Mr. Grant who was well qualified by practice for the office. As it has transpired, by a shifting of officials, Mr. Cartwright to the Court of Appeal;

Mr. McAndrew to succeed him in the Queen's Bench Division; Mr. Lee to succeed Mr. McAndrew in the taxing office; Mr. McNamara to succeed Mr. Lee as Clerk of Records and Writs, a vacancy is made in the judgment office. It is said that the place, though not the office, is to be filled by the appointment of a layman, sometime a whole-sale merchant, lately an estate agent, without any other known qualification for the office than his bright and popular manner.

#### **Acceptance of Public Offers.**

The history of an acceptance of a public offer is told in *Stollery v. Maskelyne*, 15 T. L. R. 79. Mr. Maskelyne, conjurer and entertainer, made a public offer by words accompanied by gesture to pay £500 to anyone who would produce a successful imitation of his box trick. The trick was performed by a man being enclosed in a box which was put into a cabinet, and getting out without apparent aid. The plaintiff produced an imitation and demanded payment of the £500 which the defendant refused to pay. Hence this action. At the first trial the jury disagreed. At the second, a verdict was found for the plaintiff.

Some interesting points were discussed and disposed of. The most important, perhaps, was whether it was properly left to the jury to find what the offer was. The contrary was vigorously contested on the ground that it was for the Judge alone to interpret it. A. L. Smith, L.J., said as to this, "Where there was a parol contract it was not for the Judge to say what was its meaning. If the contract was by parol, it must go to the jury." The dictum loses some weight from the ruling that the defendant could not raise the point as he had not objected at the trial to its being left to the jury.

Rigby, L.J., said he would not have accepted the proposition that a parol contract was for the jury to interpret, if it had been necessary for the decision of the case. His Lordship put the case that if plaintiff alleged certain words in his statement of claim which the defendant admitted,

the meaning would have had to be determined by the Court. Or if the plaintiff proved certain words, and defendant's counsel then said he admitted them, the same result would follow. But "as at present advised the real rule seemed to him to be this—that where there were not only words spoken, but acts which might vary the signification of the words, the question as to the meaning of the words must go the jury, as they were the only interpreters of the meaning of the acts, and therefore were only interpreters of the meaning of the whole transaction."

Collins, L.J., said, "Even if there was an absolute agreement as to what the words were, and the defendant submitted that the words were incapable of bearing the meaning which the plaintiff put upon them, then the Judge must rule upon that, as in actions of slander. But if the words were capable of bearing that meaning, then if the question of their meaning would be for the jury, and the jury would have to say in what sense they were used." We have a variety of opinion here, which leaves the matter, as far as this case is concerned in an uncertain state. Practically, it is very easy under this decision to get a parol contract to the jury. For it is a rare thing for anyone to speak, particularly on such an occasion as this, without some gesture; and the case would always require to go to the jury. There may, however, be extracted from the judgments a balance of opinion in favour of leaving the parol contract absolutely to the jury. Lord Justice Smith states so without equivocation. Lord Justice Collins agrees that it must go to the jury to ascertain the meaning, the judge first having ruled that the words are susceptible of the meaning which the plaintiff puts upon them, the defendant not agreeing to it. The practical result of this is that every contested parol contract must go to the jury. If the plaintiff asserts, and the defendant does not deny a specific meaning, there is no issue as to the meaning of the contract. If there is a contest, and there will rarely be one unless the defendant has some other reasonable meaning to advance besides that

of the plaintiff, then it must go to the jury to ascertain which was intended. If the words are not admitted then it must go to the jury to find the words.

A much wider discussion took place in *Carlill v. Carbolic Smoke Ball Co.*, L. R. (1893) 1 Q. B. 256. There an advertisement offered £100 to any person who contracted influenza after using a smoke ball according to directions. The plaintiff alleged that she had contracted influenza under the advertised conditions, and also contracted with the defendants. It was decided there, that there was a promise, a consideration by reason of using the smoke ball at the request of the defendants, that acceptance need not precede performance of the conditions but might be contemporaneous therewith, or in other words the performance was the acceptance, and that no communication with the advertisers was necessary before performance. The illustration was given of a person offering a reward for the recovery of lost property. It would not be necessary for every person who intended to claim the reward, first to write and accept the offer before commencing the search. So here, performance amounted to acceptance, and on notification of performance, the contract was complete.

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# THE CANADIAN LAW TIMES.

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FEBRUARY, 1899.

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## HISTORICAL ACCOUNT OF THE COURTS OF JUDICATURE IN NOVA SCOTIA.

THE object of this paper is to present an outline of the history of the several courts of justice both civil and criminal which have administered the laws of this Province from its earliest settlement to the present day—to trace the origin of their jurisdiction—to follow in historical sequence their growth and development; to mark the various changes and modifications in their constitution and procedure, and to note some of the peculiarities of our judicial system. This information is to be found principally in the archives of the Province, which, owing to the care of the late Dr. Aikins, have been preserved and arranged in an accessible form. Too much credit cannot be given to that learned and honoured Nova Scotian for the zeal and fidelity with which he performed that useful work.

I take more pleasure in publicly bearing testimony to his honourable character, and accurate work, because not long since both were violently assailed in a work which largely dealt with his labour in connection with the Provincial Archives. No one who knew that venerable and highly esteemed gentleman would for a moment credit such aspersions, but with the outside world such slanders uncontradicted might have some weight.

In these archives are to be found the Royal Commissions to our early Governors, the Royal Instructions under which they acted, their voluminous correspondence with the Lords

of Trade, at that period in charge of colonial affairs in England, the Statutes, Orders and Regulations passed before the Legislature was first convened by the Governor and Council in carrying out these instructions. All these must be consulted, and, lastly, the many volumes of statutes enacted by the first and succeeding Legislatures in order to obtain a clear and connected view of the origin and evolution of our Courts of Justice. For these reasons it is not possible to vouch for the absolute accuracy in all details of the account I have ventured to give in these pages. I trust at least material has been brought together which may aid some future student of the subject in pursuing his investigations.

Prior to the landing of Cornwallis and his band of immigrants, the seat of government was the ancient town of Annapolis Royal, then garrisoned by British soldiers under Paul Mascarene. The executive government, both civil and military, was administered by him in conjunction with a council composed of officers of the army then on the station. Murdoch in his *Epitome of the Laws of Nova Scotia* tells us : " From the acquisition of Nova Scotia in 1713 till 1749 a kind of civil government existed at Annapolis in the title of Governor held by the commanding officer of a regiment stationed there. He had also a few councillors, such as his major and senior captain to assist him, but his post was a little village, and the French Acadians allowed all their affairs to be managed by their cures, having among them neither magistrates, lawyers, nor any kind of civil officers. The English did not attempt colonization here till 1749, when the appointments of Governor, Lieutenant-Governor and Councillors were conferred on the commander of the troops, and principal colonists at Halifax, who erected Courts of Justice, and passed ordinances, and under their rule the colony was managed until 1758 " (a).

This statement is not quite accurate, perhaps I should say does not fully present the position of matters. On reference to Calnek's *History of the County of Annapolis* at page 69, I find the following : " The year 1721 was marked by the establishment of a Court of Judicature at Annapolis.

(a) Vol. I, p. 59.



At a meeting of the Council held on the 10th day of April it was resolved 'That the Governor and Council do sit as a General Court or Court of Judicature four times a year.' They then appointed the first Tuesdays in February, May, August and November for the sittings of the Court. It likewise appears that in March, 1727, they issued the first commission of peace in this province, by which Adams, Skeene and Shireff were appointed Justices of the Peace to form a civil court, their judgment to be reported to the Lieutenant-Governor for confirmation."

The Court so constituted exercised both Civil and Criminal jurisdiction, as we find reports of several cases heard and decided by them. One is so curious and interesting that I extract from the same volume an account of the trial and punishment. "It was in this year, also," says the author, "that a Council was held in the house of John Adams to consider a complaint made by Governor Armstrong against Robert Nichols, his servant, for an assault upon him made at Canso nearly a year before. He was found guilty and sentenced as follows: 'You, Robert Nichols, being found guilty of the crime wherewith thou art charged by the Honourable Lawrence Armstrong, Lieutenant-Governor and Commander-in-Chief of this His Majesty's province of Nova Scotia, the punishment therefor inflicted on thee is to sit upon a gallows three days, half an hour each day, with a rope about thy neck and a paper on your head whereon shall be wrote in capital letters 'Audacious villian,' and afterwards thou are to be whipped at a cart tail from the prison to the uppermost house on the cape and from thence back again to the prison house, receiving each hundred paces five stripes upon your bare back with a cat o' nine tails, and then thou art to be turned over for a soldier.'"

In 1732 the same Court tried and decided a suit between Joseph Jennings and William Winnett respecting the ownership of a house and premises. At this trial we have the first instance of a lawyer practising his profession in the province, by the name of Ross. In all probability this gentleman was the progenitor of the many distinguished lawyers who have adorned our judicial annals.

In August, 1734, an action for slander was tried in which Mary Davis was plaintiff and Jane Picot, wife of Louis Thibault, was defendant. The decision was in plaintiff's favour, and the unfortunate defendant was sentenced "to be ducked on Saturday next, 10th inst. at high water,"—no light punishment in view of the muddy waters of Annapolis. At the instance, however, of the plaintiff, this punishment was commuted to publicly asking her pardon at the church door.

Matthew Henry was convicted before this Court of larceny and sentenced to receive fifty lashes on his bare back and to return the money.

Among the magistrates and officers appointed to conduct the proceedings of this Court I find the names of several French Acadians, which would indicate that the quarrels and litigation between these people were not exclusively settled by their cures. Early accounts represent them to have been of a very litigious character, and not that sweet peace-loving people so celebrated in modern literature.

The foregoing is sufficient authority for the statement that Courts of Judicature of some description existed at the date of Cornwallis' arrival in June, 1749. From that time all jurisdiction so exercised must have ceased, and for the foundation of our judicial system we must look to the commission of Cornwallis and the acts and ordinances of his Council passed before the first House of Assembly met, 1758, and the Royal Instructions conveyed to him and his successors.

The commission appointing the Hon. Edward Cornwallis, Governor of Nova Scotia bears date 6th May, 1749. He arrived in Halifax on June 21st following in the sloop of war "Sphinx," and immediately summoned Colonel Mascarene from Annapolis with five of his Council to meet at Halifax for the purpose of constituting the government of the colony. On Friday, July 14th, the new Council were appointed and sworn into office, and a Council was for the first time held on board the transport "Beaufort." Their names were Paul Mascarene, John Gorham, Benjamin Green, John Salisbury and Hugh Daudin, and on the 17th July, at

another meeting, Wm. Steele was appointed and sworn in; on the 27th July, Peregrine Thomas Hopson; on the 28th July, Robert Ellison and James Frances Mercer were added, and on the 31st July John Horneman and Charles Lawrence. Edward How was also sworn in on the 13th of August. These were the men in conjunction with Cornwallis who took the first steps in the formation of the judicial system of our province.

On the 18th of July the Governor-in-Council made the first appointment of Justices of the Peace for the township of Halifax as follows: John Brewse, Robert Ewer, John Collier and John Duport.

Cornwallis' commission conferred very extensive and necessary powers. We are not at present concerned with any except those relating to the administration of justice and the making of laws. That part reads as follows: "And for the better administration of justice and the management of the public affairs of our said province, we hereby give and grant unto you the said Edward Cornwallis full power and authority to choose, nominate, and appoint such fitting and discreet persons as you shall either find there or carry along with you, not exceeding the number of twelve, to be our Council in said province—as also to nominate and appoint under your hand and seal all and such other officers and ministers as you shall judge proper and necessary for our service and the good of the people whom we shall settle in said province until our future will and pleasure shall be known. . . .

"And likewise that you take the usual oath for the due execution of the office and trust of our Captain General and Governor-in-Chief of our said Province for the due and impartial administration of Justice. . . .

"And we do give and grant unto you full power and authority, with the advice and consent of our said Council from time to time, as need shall require, to summon and call general assemblies of the freeholders and planters within your government according to the usage of the rest of our colonies and plantations in America, and we do by these

presents give and grant unto you the said Edward Cornwallis full power and authority, with the advice and counsel of our said council, to erect, constitute and establish such and so many courts of Judicature and public justice within our said province and dominion as you and they shall think fit and necessary for the hearing and determining of causes as well criminal as civil according to law and equity and for the awarding of execution thereupon with all reasonable and necessary power, authorities, fees and privileges belonging thereunto, as also to appoint and commission fit persons in the several parts of your government to administer the oaths mentioned in the aforesaid Act entitled 'An Act for the Security of His Majesty's Person and Government, and the succession of the Crown in the heirs of the late Princess Sophia being Protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors,' as also to tender and administer the aforesaid declaration unto such persons belonging to the said Court as shall be obliged to take the same.

"And we do hereby authorize and empower you to constitute and appoint Judges, and in cases requisite, commissioners of Oyer and Terminer, Justices of the Peace, and other necessary officers and ministers in our said Province for the better administration of Justice and putting the law in execution, to administer or cause to be administered unto them such oath or oaths as are usually given for the due execution and performance of offices and places and for the clearing of truth in judicial cases. . . .

And that you the said Edward Cornwallis, with the advice and consent of our said Council and assembly, or the major part of them respectively, shall have full power and authority to make, constitute and order laws, statutes and ordinances for the public peace, welfare and good government of our said province, and the people and inhabitants thereof, and such others as shall resort thereto, and for the benefit of us, our heirs and successors, which said laws, statutes and ordinances are not to be repugnant, but as near as may be agreeable to the laws and statutes of this country of Great Britain."

From the language of this commission the full and extensive powers conferred upon the Governor and Council are easily gathered. Such wide and plenary jurisdiction was a necessary incident to the founding of a new colony, which Nova Scotia was, so far as the English settlement was concerned. It is further to be borne in mind that, with the exception of the garrison at Annapolis, no English settlement then existed, and that the population of other parts of the province consisted of French Acadians and Indians. No division of the province into districts or counties had taken place, and such ordinances and regulations as were made, referred principally to the town of Halifax, although the jurisdiction extended to the whole province.

The next branch of our enquiry is to ascertain how these powers were exercised. At the first meeting of Council on July 14th, 1749, his Excellency and the Councillors took and subscribed the following oath, which is termed on the record of the Council, "An Oath for the Impartial Administration of Justice"—"I , do swear that as a member of the Supreme Court of Jurisdiction, I will always give my judgment impartially, and to the utmost of my skill and knowledge according to justice, right and equity, so help me God."

Such was the first Court of Judicature in this province, the powers of which were exercised by the Governor-in-Council under the title of the "General Court." Of the gentlemen who composed this Court, some were eminent in the early settlement of the province, but, so far as my enquiries have gone, I have not found that any of them were trained lawyers except Duport.

Having assumed the functions of a tribunal of Civil and Criminal Jurisdiction, they were soon called upon to act. The first trial which took place before the Court was that of Peter Cartell for murder. On the 28th August, 1749, at a meeting of the Council, his Excellency read to the Council that article of His Majesty's Instructions relating to the general Court, and proposed that the same be held as soon

as possible for the trial of all persons in custody, and particularly Peter Cartell for the murder of Abraham Goodside on the 26th inst. Ordered that the Secretary publish an advertisement that the General Court will assemble on Thursday morning at ten o'clock at the Storehouse to try and determine all causes, civil or criminal, that shall be brought before them.

Ordered that the Provost Marshall be required to summon twelve from each quarter of the town of Halifax to attend the General Court as jurymen.

As this was a trial of some importance and the first one in our annals, I give some further details taken from Murdoch's History, Volume II., page 156. He says: "One Peter Cartell had killed Abraham Goodside, the boatswain's mate of the 'Beaufort' by stabbing him, and had also wounded two other men. The Governor-in-Council sat as a General Court to try him. On 31st August, O. S., a grand jury found a bill against him, a petit jury found him guilty of murder and he was hanged under warrant from the Governor, 13th September, 1749. There was a tradition that a large tree was used instead of a gallows in the earliest years of Halifax. This unhappy child of the forest stood near the market square."

Governor Cornwallis in a letter to the Duke of Bedford, dated 11th Sept., 1749, says: "A general Court was held the 31st August in one of the storehouses for the trial of one Peter Cartell for murder. The Saturday before he had stabbed the boatswain's mate of the 'Beaufort,' who died upon the spot, and wounded two men that endeavoured to seize him. I enclose an account of the trial, having endeavoured to keep as near the English custom as possible." Archives, page 587.

The Lords of Trade in acknowledging this letter, 16th Oct., 1749, say: "Your method of proceeding in the trial of Peter Cartell for murder was very regular and proper, and will have a good effect, as it will convince the settlers of the intention of conforming to the laws and constitution of the mother country in every point."

This trial, as stated by Cornwallis, appears to have been conducted in accordance with English law and to have proceeded on the well-known principle that the colonists take with them so much of the common law of England as is suitable to their condition and circumstances. Up to this date no laws or ordinances appear to have been enacted or made by the Governor and Council.

I append hereto the indictment in this case, which minutely follows the old form then used in such matters:

THE KING  
*against*  
PETER CARTELL.

The Town of Halifax in Nova Scotia, to witt,

The Jurors for the Lord our King upon their oath do present that Peter Cartell of sd. town of Halifax, settler, not having the fear of God before his eyes, but moved and seduced by the Instigation of the Devil on the twenty-sixth day of August and in the twenty-third year of the reign of the sd. Lord the King about five of the clock in the afternoon of the same day at Halifax afforsd. with Force and Arms in and upon one Abraham Goodsides, mariner in the Peace of God and of the Lord our King then and there being, made an assault and most traytorously, feloniously and voluntarily and of his malice forethought, struck and wounded the said Abraham Goodsides at Halifax afforsd. with a knife the value of twopence, which the said Peter Cartell then and there had and held in his hand and feloniously and of his malice forethought gave the sd. Abraham Goodsides one mortal wound with the knife afforsd, and upon the left side under the lays of the Depth of four inches and of the Breadth of one inch, of which said mortal wound the sd. Abraham Goodsides instantly dyed, and so the said jurors and on their oath say that the said Peter Cartell the Day and Year afforsd. the said Abraham Goodsides in manner and form afforsd. of forethought malice most traytorously, feloniously and voluntarily killed and murdered against the Peace, Crown and Dignity of our Sovereign Lord the King and contrary to the statute in that case made and provided. In witness whereof the sd. jurors have hereunto

sett their hands this thirty-first day of August in the Year of our Lord one thousand seven hundred and forty-nine.

Jos. Fairbanks,	John Aubony,
Jn. Clark,	William Jeffray,
John Steinfort,	R. Reeves,
Henry Windell,	John Endy,
L. Hays,	G. Davis,
G. Hicks,	Tho. Rust,
Richd. Catherwood,	Bn. Gerrish,
Chas. Maxwell,	Thos. Lewis,
Geo. Nagel.	

From the correctness with which it was drawn and the regularity of the Court proceedings it seems the Court must have been under the guidance of a lawyer.

On Sept. 6th, 1749, the first civil action came before the Council. Elijah Davis petitioned for satisfaction from Ephriam Cook, Master of the "Baltimore," for damages done to his schooner by said Cook, who cut off the bowsprit when by accident his schooner was foul of his, Cook's, ship. The witnesses on both sides were heard, when from the record it appears the Court were fairly at a loss how to decide from their ignorance of nautical terms. They suggested that the dispute be referred to two ship masters, who, in event of disagreement were to appoint an umpire whose decision was to be final. This was agreed to and an award was made against Cook. As Cook refused to comply with the decision, the matter was again brought before the Court, who ordered that Cook be summoned immediately to answer for want of respect and contempt. Cook attended and alleged that he had no thought of any contempt, but that he could not answer it to his owner if he paid the money without being distrained. Thereupon it was ordered that a warrant be issued to the Sheriff for execution of the award and order, and further resolved that E. Cook ought to ask pardon of his Excellency for having treated his order disrespectfully, and that he acknowledge his fault in writing. "Till he has so done be he ordered not to set his foot on the shore."

Following this, on Nov. 14th, 1749, we have the first action concerning real estate in which Beardsley Glazier claimed that Samuel Shipton had taken possession of lot



No. 25 which had been granted to the complainant, and had built a house on it. Shipton, being summoned, complained that Mr. Brewse, the Engineer who had the laying out of the lots, had given him the choice of lot 25 or No. 3; that he had given up No. 3 to Mr. Crosby. The register being sent for, it appeared that Shipton's name had been erased out of No. 3 and Crosby's inserted. This the Council forbade being done, and that the transfer were only to be made by deed. The parties in the meantime settled the dispute by Shipton giving up the lot to Glazier, and Glazier agreeing to give Shipton materials of all kinds equal to those he had put in the house he had built on Glazier's lot.

At a meeting of Council on the 20th Nov., 1749, comes the sequel. Samuel Shipton now petitions to have lot No. 3 on which he had built before he built on No. 25 and given to Crosby, to be restored to him. He asserts that he never entirely abandoned No. 3 to Crosby, but only on condition that he should be established on No. 25. The matter being heard before the Council, Crosby denied the condition, and produced several witnesses in support of his contention that there was no such condition. Shipton being called on for his testimony in support of his case, said the only person present was his wife, and desired that she might be heard, which was agreed to. She was heard and corroborated her husband as to the condition. The following is the judgment of the Court. "It is the unanimous opinion of the Council that Mr. Shipton has produced no sufficient proof of the agreement being conditional. On the contrary, from the evidence examined, the strongest presumption appeared that Mr. Shipton had entirely relinquished the lot No. 3 to Mr. Crosby, and therefore the Council do adjudge the said lot No. 3 to Mr. Crosby."

I have given these three instances of the exercise of jurisdiction by the General Court in Criminal and Civil matters to show the extent of it, and the methods of procedure adopted, perhaps, in some respects, rather arbitrary and irregular, but on the whole justice and equity prevailed, and law and order was maintained in the infant settlement.

From an entry in the Council Records dated Nov. 20th, 1749, it is evident that among the settlers there must have

been some hard characters. The record says: "The Council, being informed that there had been for some time several prisoners in jail for crimes alleged against them, resolved to hold a General Court on Tuesday the 28th inst." It was also resolved that the General Court be held every year, one on the last Tuesday of April, and one on the last Tuesday of October. This was the beginning of regular sessions of the Court, and it is worth noticing that we have retained up to the present day the same periods for the sittings of the Supreme Court in Halifax.

On December 27th, 1749, I find another instance of the sitting of this Court for the trial of crimes: "The Council being informed that the prisoners in jail for killing cattle upon Cornwallis Island had petitioned for their trial, resolved that a General Court be held on Thursday, 4th May."

Again, at a meeting of Council 27th May, 1750, we find the following record: "His Excellency laid before the Council the information he had received from Major Lawrence that he captured one Joseph LeBlanc, who was evidently the principal instrument of the enemy in those parts, who had confessed the whole. His Excellency acquainted the Council that he had a warrant ready to send to Major Lawrence for the immediate execution of Joseph LeBlanc, but desired to know their opinion, which would probably have the greatest effect, a sudden example of justice, or a fair trial before the General Court with the other prisoners now in custody at Minas. Resolved that Joseph LeBlanc (Labrador) and the two men taken in the bay by Hill, Jean Bathreo and Pierre Rembbiro, be brought to their trial before the General Court in the beginning of August next."

On the 30th July, 1750, Resolved to hold a General Court for the trial of the French prisoners and the criminal cases, and that no civil cases be brought before this Court. I have not followed the record to discover the fate of these prisoners, as not especially pertinent to the object of this paper.

On the 21st August, 1750, the Council were called upon to exercise a different jurisdiction, that is to say to issue a writ of Prohibition to the Admiralty Court not to try therein

a cause between Groves, Master of the sloop "Sally," and one Hurd, a factor of Mr. Thomas Gunter of Boston. Hurd contended that Groves had not fulfilled his contract which was made within the body of a county, and so ought to be tried before the General Court and not in the Admiralty. Counsel being heard for both parties, the Council were unanimously of the opinion that upon the face of the libel no reason appears as a sufficient ground for granting a prohibition.

From this it is evident that the Court of Vice-Admiralty must have been constituted very shortly after Cornwallis arrived, but as no record of the fact is to be found in the minutes of Council, I assume such jurisdiction was either exercised directly under an Imperial Commission, or that the Governor by virtue of his commission as Vice-Admiral appointed the Judge as his delegate. I find on reference to the oldest Admiralty Record Book now in the archives, that the Hon. Edward How was the first Judge of the Court of Vice-Admiralty, that Charles Morris was Registrar, and William Chapman, Marshall. Benjamin Green was Surrogate Judge appointed by How, and Hinchelwood was one of the Proctors. Subsequently Green became Judge. The first recorded case is one by Michael Henley v. Ephriam Cook, tried October, 5th, 1749, four months after the settlement of Halifax.

That the Admiralty Court was not idle is shown by an entry of Oct. 11th, 1750, as follows: "Advised that Otis Little, Esq., acting as King's Attorney, be directed to examine the depositions taken relating to the French brig lately brought into this port by His Majesty's ship "Albany," and make report what proceedings relating to the said Brig. are legal and regular according to the treaties subsisting between the Crowns of Great Britain and France, and British Act of Parliament. On Oct. 15th, 1750, Otis Little makes a report to the Council, and it was directed that the Brig. be proceeded against in the Court of Vice-Admiralty for breach of the acts of Trade.

*(To be Continued.)*

CHARLES J. TOWNSEND.

## EXTRA-TERRITORIAL CRIMINAL LEGISLATION OF CANADA.

(Concluded.)

In addition to the opinion of Sir Fitzroy Kelly and Sir Hugh Cairns, adverse to any colonial extra-territorial jurisdiction, which has been already mentioned, the Chief Justice cites a case from Hall's International Law (*a*) where the Home Government, in deference to a protest from the United States, declined to support the conviction in Calcutta of an English sailor, who had stabbed the mate on an American vessel while on the high seas. The sailor was prosecuted under an Indian statute. But an examination of the case in Wharton's Digest of International Law (*b*), from which Mr. Hall takes it, does not clearly shew that the Imperial Government regarded the Indian statute as invalid, but rather that it acted in accordance with the principle of international law, that in the country in which, or upon whose vessel on the high seas, a crime is committed, is vested primary jurisdiction over such crime. It is as an illustration of an infringement upon this principle that Mr. Hall cites the case. Moreover, the Indian statute was not restricted to British subjects resident in India.

The opinion of Solicitor-General Sir John Campbell, and of Sir R. M. Rolph (*c*), on the illegality of the Lower Canadian Ordinance which provided for the transportation of certain Canadian prisoners to Bermuda and their detention there, turns upon the fact that the latter part of the Ordinance was "to be executed beyond the limits of the Province," and would appear, as stated by the learned Chancellor Boyd, to be inapplicable.

There are however, a couple of cases mentioned by Mr. Todd (*d*) which are in point. "By order in Council,

(*a*) 3rd ed. at p. 252, *n*.

(*b*) Sec. 33 *a*.

(*c*) Forsyth on Constitutional Law, pp. 465-6.

(*d*) Parliamentary Government in British Colonies, 2nd ed. pp. 177-8.

January 6, 1862, a Canadian Act, passed and assented to in 1861, to give jurisdiction to Canadian magistrates in respect of certain offences committed in New Brunswick by persons afterwards escaping into Canada, was disallowed as being in excess of the jurisdiction belonging to the Canadian Parliament, and only properly to be effected by Imperial legislation or by an arrangement between the two Provinces" (e). By 32 & 33 Vict. cap. 23, the Dominion Parliament made certain provisions respecting the crime of perjury. On December 17th, 1869, the Secretary of State for the colonies notified the Governor-General that, while Her Majesty would not be advised to disallow that statute, he observed that the third section assumed to affix a criminal character to acts committed beyond the limits of the Dominion. "As such provision is beyond the legislative power of the Canadian Parliament," the Secretary of State requested the Governor-General to bring the matter before his Ministers with a view to amendment of the statute. The Canadian Government apparently conceded that the objection to their legislation was well taken, for during the following session the statute was amended so as to restrict its operation to offences committed within Canada (f).

Mr. Todd's view (g), that our Parliament has no extra-territorial jurisdiction, is shared by Mr. Clement (h). Sir John Thompson, speaking in the House of Commons, said that "Canada being a colony, this Parliament can only legislate for offences committed in Canada." This he considered the effect of the decision in the Australian case (i). Mr. Dicey's opinion is that "no colonial Legislature has, as such, any authority beyond the territorial limits of the colony" (j). In *Routledge v. Low* (k), Lord Justice Turner says, "The

(e) Can. Leg. Ass. Jour., (1862) p. 101.

(f) 33 Vict. cap. 26, now Criminal Code (1892), sec. 149; Can. Sess. Papers (1870), No. 39.

(g) Parl. Govt. in British Colonies, 2nd ed. p. 159 *et seq.*

(h) The Canadian Constitution, pp. 185-193.

(i) Hansard, June 3rd, 1892, pp. 3321-2. As to the weight of such an opinion, see *Reg. v. Bishop of Oxford*, 4 Q. B. D. 525; *Smiles v. Belford*, 1 App. R. 436.

(j) The Constitution, 4th ed. p. 98 n.

(k) 1 Ch. App. at p. 47.

laws of a colony cannot extend beyond its territorial limits"; and Lord Chelmsford in the House of Lords uses language conveying the same idea (*l*). There are several dicta of eminent Judges, such as are found in *Powell v. The Apollo Candle Co.* (*m*), indicating that the powers of colonial legislatures are limited in area as well as in subject, and *Craw v. Ramsey* (*n*), is an old authority for the existence of implied limitations upon the powers of every legislature which is the creature of Imperial statute.

A glance at our legislative powers in the matter of naturalization—a cognate subject—may be of assistance. The B. N. A. Act in terms unlimited confers upon Parliament jurisdiction to legislate in regard to "Naturalization and Aliens." But it would seem to be more than probable that naturalization under a colonial statute cannot give status as a British subject outside the colony. Such apparently is the effect of the Imperial statute 10 & 11 Vict. cap. 83, re-enacted in 1870 (*o*). Lord John Russell took this view in 1863 (*p*); and our Dominion legislation seems to be expressly so limited in operation (*q*). We have here legislative recognition of a territorial restriction upon colonial legislative powers. An Act of the New Jersey Assembly naturalizing one Jacob Arents and his three children, residents of that colony, was declared by Solicitor-General Thomson to be unobjectionable, because "it can have effect to give the rights of natural-born subjects in the province only" (*r*). Chalmers, in his work entitled "The Political Annals of the United Colonies" (*s*), records the case of a Frenchman named Brunet, who had been naturalized under legislation of Virginia. He had fitted out a vessel and was trading to St. Christopher in 1682, when his ship and cargo were seized

(*l*) 3 E. & I. App. at p. 116.

(*m*) 10 App. Ca. 282.

(*n*) Vaughan, 274, at pp. 292-3.

(*o*) 33 & 34 Vict. cap. 14.

(*p*) Cockburn on Nationality, p. 37.

(*q*) R. S. C. Cap. 113, sec. 15. See Dicey on Conflict of Laws, at p. 184, discussing sec. 7 of Imperial Statute just cited.

(*r*) Chalmer's Opinions, 1st Am. ed. at p. 333. But see *In re Adam*, 1 Moore P. C. 460; *Donegani v. Donegani*, 3 Knapp 63.

(*s*) Pp. 321-2.

as property of an alien trading contrary to the navigation laws. The local Admiralty Court having declared the vessel and goods forfeited on this ground, appeal was taken to the King in Council. The matter was referred to Lord Chief Justice North, who reported the condemnation valid, because "a naturalization in Virginia or any other plantation is only local, not extending to any other colony." This opinion was approved by the King in Council and the judgment affirmed (t). On the other hand, Sir A. E. Cockburn, in his book on Nationality (u), says that the opinion of the law officers of the Crown, taken on this point in 1865, was "that a foreigner duly naturalized in a British colony is entitled as a subject of the Queen in that colony to the protection of the British Government in every other state but that in which he was born and to which he owes a natural allegiance." Chief Justice Cockburn himself thinks this the better opinion. He makes no reference, however, to the case just mentioned from Chalmers. But any argument deduced from the extent of our legislative powers in regard to naturalization is based on analogy only, and, however close the analogy, such an argument is never absolutely conclusive.

The fact that until 1891 the constitution of Vice-Admiralty Courts in Canada depended directly upon the Imperial Parliament (v), and that it was only by virtue of an Imperial statute of 1890 (w), that Canada was enabled to confer on the Exchequer Court its maritime jurisdiction (x), affords another illustration of the limitations of our legislative powers under the B. N. A. Act. Colonial Courts were enabled by earlier Imperial legislation to try criminal offences committed at sea (y).

All available sources of information upon the subject under discussion—judicial exposition as well as commentaries of jurists—appear now to be exhausted. Can the question be regarded as authoritatively settled?

(t) Journals Plant. Off. 4 V. pp. 27, 82-4.

(u) P. 37.

(v) 30 & 31 Vict. cap. 45.

(w) 53 & 54 Vict. cap. 27.

(x) 54 & 55 Vict. (D.) cap. 29.

(y) 12 & 13 Vict. cap. 96.

“Allegiance,” says Blackstone (z), “is the tie or ligamen which binds the subject to the King in return for that protection which the King affords the subject.” In old Calvin’s case, so often cited, it was laid down that “ligeance is a double and reciprocal tie, quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem” (a); “the ligeance of the subject is of as great an extent and latitude as the royal power and protection of the King, et e converso” (b). And again, “seeing power and protection extendeth out of England ligeance cannot be local or confined within the bounds thereof” (c). Mr. Justice Story says that “allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is” (d).

While the old common law doctrine that this birthright of a British subject is inalienable and indefeasable (e), may in modern times, according to the report (f) of the English commissioners of 1868-9, be “neither reasonable nor convenient,” and may “conflict with that freedom of action which is now recognized as most conducive to the common good” (g) (and to this report we owe our statutory provisions for expatriation (h)), the mutual and reciprocal character of the bond (i) and obligation between the sovereign and his subjects has never yet been questioned. Baron Parke, in *Jefferys v. Boosey* (j), speaks of “those who owe obedience to our laws and whose interests the legislature is under a correlative obligation to protect”; and Lord Brougham, in the same case, says (k), “that the legislature confines its

(z) 1 Com. 366.

(a) 7 Co. Rep. 5 a.

(b) Ibid., 7b.

(c) Ibid., 9b.

(d) 3 Peters (U. S.) 155.

(e) *Udny v. Udny*, L. R. 1 H. L. (Sc.) 441 : Cockburn on Nationality, pp. 63, 198.

(f) Cockburn on Nationality, p. 200. See also p. 214.

(g) A Roman idea according to Cicero ; Orat. pro. L. C. Balbo, 11 and 13.

(h) 33 & 34 Vict. (Imp.) cap. 14, sec. 6 ; R. S. C. cap. 113, secs. 4-6.

(i) Com. Dig. Vol. 1. p. 553.

(j) 4 H. L. C. at p. 926.

(k) Ibid., at p. 970.



enactments to its own subjects over whom it has authority, and to whom it owes a duty in return for their obedience." The old maxim, "*Protectio trahit subjectionem et subjectio protectionem*" (*l*), is recognized as fundamental in English law. As put by Chief Justice Cockburn (*m*), "protection and allegiance are correlative: it is only when protection is afforded by the law that the obligation of allegiance to the law arises."

It must not be forgotten that the question at issue is one of construction of section 91 of the B. N. A. Act. But, as Sir Peter Maxwell says (*n*), paraphrasing the language of Chief Justice Marshall in delivering the judgment of the United States Supreme Court in *United States v. Fisher* (*o*), "it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with irresistible clearness."

In the absence, therefore, of explicit terms in the B. N. A. Act, placing beyond doubt its design to effect this object, regardless of the basic principle just alluded to, we cannot ascribe to the Imperial Parliament the intention to authorize our Legislature to exact from us when abroad obedience to Canadian laws, unless at the same time we find imposed upon our Government the correlative duty of protecting our interests when without Canadian territory, and our Parliament endued with powers adequate to the discharge of this obligation. Canada has no treaty-making power; she has neither ambassadors at foreign courts, nor consuls at foreign ports; she has no military organization for offensive purposes; she cannot make war; in fine, in any matter of international concern she must act through the Imperial Government, whose intervention is requisite even in negotiations with her immediate neighbour. Having, therefore, neither the power nor the means of affording protection to them in

(*l*) 7 Co. Rep. 5a.

(*m*) Reg. v. Keyn, 2 Ex. D. 236.

(*n*) On Statutes, 3rd. ed. at p 113; *Minet v. Leman*, 20 Beav. at p. 278. *Wear Commissioners v. Adamson*, 1 Q. B. D. at pp. 554-5; 2 App. Ca. 743; *Dwarris*, 2nd. ed. at p. 564.

(*o*) 2 Cranch (3rd. ed.) at p. 207.

foreign countries, Canada cannot legitimately require of her citizens when abroad obedience to her laws. It is to the British Consul, the British Ambassador, the British Foreign Office, and, ultimately if need be, to the British Army and Navy, that Canadians when outside Canada look for the protection and vindication of their rights and interests. Does it not logically follow (saving always the primary jurisdiction of the country in which from time to time they happen to be actually sojourning) that to the Imperial Parliament alone belongs the right to regulate the conduct of Canadians in a foreign state, or in any part of the British Empire other than Canada? *Protectio trahit subjectionem*.

It has been suggested that Parliament might evade this difficulty by declaring criminal the return to Canada of a Canadian who had committed certain offences abroad. Apart from the objection that thus to affix criminal consequences to an act in se innocent would be an unworthy attempt to accomplish indirectly what could not be done directly, and would be an abuse of legislative power, such an enactment obviously framed to reach and punish acts over which our Parliament had no control, by making a fictitious offence, would be an exercise of our discretionary power of legislation "for the peace, order and good government of Canada," contrary to the spirit of the B. N. A. Act and beyond "the limits to which an honest man, competent to the discharge of his office, ought to confine himself" (*p*), and as such might well be held to be without the scope and purview of the jurisdiction entrusted to our Parliament.

It remains to note what may be an exception to the general rule that, as a dependency, Canada has no extra-territorial legislative jurisdiction. Parliament is by the B. N. A. Act enabled to legislate in regard to "Militia, Military and Naval Service and Defence" (*q*). Should it at any time become necessary for defensive purposes to equip a Canadian vessel of war, would our sailors and marines when distant more than three miles from our shores, cease to be subject

(*p*) Per Lord Kenyon, *Wilson v. Rastall*, 4 T. R. 757.

(*q*) Sec. 91, s-s. 7.

to Canadian law (*r*) ? This possible exception can be merely *suggested*, however; it cannot be discussed in the present *article*, which has already far exceeded its anticipated limits.

Though not without diffidence, due to the opinions to the contrary of several eminent judges, it is submitted that, subject, perhaps, to the single exception just alluded to, our Parliament has not been clothed with jurisdiction to so regulate the conduct of Canadians as to constitute their acts, committed without the territorial limits of Canada, criminal offences (*s*).

FRANK A. ANGLIN.

(*r*) Mr. Lefroy refers to *Brisbane Oyster Fishery Co. v. Emerson, Knox*, (N. S. W.) at p. 86, where Sir J. Martin, C.J., said, "It cannot be contended for a moment that any colonial legislature can bind persons residing out of its colony. This difficulty has been practically felt wherever it has been proposed to establish a Colonial Navy, inasmuch as our legislature has no coercive jurisdiction outside the limits of its own territory."

(*s*) 27 S. C. R. at p. 471.

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## EDITORIAL REVIEW.

**Sir Thomas Taylor.**

The resignation is announced of Sir Thomas Taylor, Chief Justice of Manitoba.

Sir Thomas Taylor's first official position was Judge's Secretary, afterwards Referee in Chambers, in the Court of Chancery, Ontario. He subsequently became Master in Ordinary of the Court of Chancery, and after the passage of the Judicature Act, of the Supreme Court of Judicature in Ontario.

In 1886 he was appointed to the Manitoba Bench, and in 1887 he was made Chief Justice, and afterwards received the honour of knighthood.

All through the career of Sir Thomas Taylor he was distinguished by accurate knowledge of law, promptness and alacrity in the despatch of business, and a complete knowledge of the duties of his office. When Chancery Chambers were held business was taken up early, proceeded with promptly and despatched with all compatible speed. His industry was evidenced by his publication of "Taylor's Chancery Orders," which was at the time the vade mecum of the Chancery practitioner. This was followed, when the Judicature Act was passed by the "Practice of the Supreme Court of Judicature." Holding at the same time the office of Referee of Titles under the Quieting Titles Act, he published a work on the Investigation of Titles to Land. Subsequently in the Master's office, he exhibited the same characteristics as when Referee in Chambers; and though he had a difficult task as successor of the present Chancellor of Ontario, his thorough administration of the duties of the Master's office will long be remembered. Such a long training in judicial work necessarily prepared Sir Thomas for the position of a Judge of a Superior Court,

and it goes without saying that his judgments always commanded the greatest respect, not only in Manitoba, but in Ontario.

We hope that Sir Thomas will long live to enjoy the repose to which he is so well entitled.

**The late Judge Dartnell.**

One of the most prominent of the County Judges has passed away in the person of Judge Dartnell, who for many years held the position of Master in Chancery at Whitby, and subsequently Local Master of the Supreme Court of Judicature. He was appointed Junior County Judge in 1893, and in 1896 became Senior County Judge on the death of Judge Burnham.

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## BOOK REVIEW.

*Snow's Legal Compendium and Diary* for 1899. Montreal : John Lovell & Son.

Books of this kind are usually put on the shelf and remain there. We know of no book of the kind that can be so usefully and so often taken off the shelf as this one. As a rule we have not much faith in Legal compendiums, but faith has been restored by this one. It is a complete compendium of the Supreme and Exchequer Courts Act and practice. It contains tariffs of costs and other information which has to be referred to constantly.

A great many Acts of Parliament have been condensed such as the Companies' Act, the Ontario, Quebec and B. C. Companies' Act, the Evidence Act, Bank Act, etc., etc. It is a Law list, a Bank directory, a Court calendar, a directory of officials, and so on. It contains an index to Dominion and Provincial statutes since 1867, and a host of other things too numerous to mention.

Some of the annotations and essays are very well done, and we make particular reference to Mr. Marsh's Table of Descents in Ontario. This is unique in giving the authorities for the conclusions arrived at. In the first column is found the particular class of descendants, and the second the mode of sharing, with the authority for the proposition. Lastly, a complete diary is bound up with the volume, large enough for a day's entries at each day's space.

## YORK LAW ASSOCIATION REPORT, 1898.

There are at present 317 members of the association, of whom 24 have not paid their fees for the year. This number is considerably less than the number of practitioners reported at the last annual meeting to be members of the association, but for several years the names of a number of practitioners have appeared upon the books of the association as members, although they have not paid their fees. The names of these practitioners have now been removed from the books of the association, and the present statement shows clearly the position of membership. During the year 12 practitioners became members.

There are now in the library 3,611 volumes, 187 having been added during the year, as follows: Reports, 38 vols.; Statutes, 26 vols.; Text Books, 70 vols.; Periodicals, 43 vols.; miscellaneous, 10 vols. Of these 187 volumes, 80 were received unbound and bound during the year, and 47 were donations. The more important purchases during the year were the Digest of English Case Law, the Encyclopaedia of the Laws of England, and 22 volumes of the Central Law Journal, which makes the set of the Journal complete.

The Board has continued to direct its attention during the past year to the question of obtaining suitable accommodation for the library and for the profession in the new Court House. An arrangement has been made whereby four rooms have been set apart to the west of the Court room, situate at the north of the buildings. These rooms are on the fourth floor, above that on which the Court rooms are situate. The rooms will furnish ample accommodation for the library and a robing room. Suitable lavatory accommodation is to be provided, and the suite of rooms is reached by a private staircase.

It would, of course, have been much more convenient had the consulting rooms been on the same floor as the Court rooms, but no proper arrangements were made in the original plans for the proper accommodation of the bar, and in the end the arrangement which has been made was prac-

tically the only one left open for choice. The trustees believe that the disadvantage of having the library and robing rooms on the floor above the Court room is compensated by securing privacy for the library and the members of the Bar.

The trustees with great regret call the attention of the members to the fact that a large number of practitioners in Toronto are not members of the association. Many of them make use of the library, and it seems to be impossible to make rules which will prevent this being done. Many other members of the profession have withdrawn from the association during the last few years upon the ground that they did not make any use of the library. It seems hardly necessary to draw attention to the fact that the organization of the association afforded a means of watching and properly protecting the interests of the profession which never existed before the association was formed. The library at present is in thoroughly good working order, and is made use of by a large number of the profession, but while the formation of the library was of the greatest importance to the profession it was of greater importance, the trustees think, that a means was thus obtained of giving expression to the views of the profession from time to time as it became necessary. On many points the association has made its influence felt. It is undoubtedly the fact, for example, that if it had not been for the efforts of the association no provision whatever would have been made in the library whereby proper accommodation would have been furnished for the Bar at large.

The many members who have served upon the board know that questions of importance to the whole profession are continually coming up for consideration by the trustees, and receiving careful attention. The trustees beg that the attention of the members be called to these facts, and they express the hope that some effort will be made to induce many practitioners who are not members of the association to join during the coming year.

The trustees record the death during the year of the following members: D'Alton McCarthy, Q.C.; W. M. Merritt, W. J. Franks.



The insurance upon the books of the library now amounts to \$10,000. This amount is believed by the board to be sufficient.

At the annual meeting of the association, held January 30th, last, the following officers were elected: President, Mr. Wm. Mortimer Clark, Q.C.; vice-president, Mr. J. H. Macdonald, Q.C.; treasurer, Mr. Walter Barwick; curator, Mr. Angus MacMurchy; secretary, Mr. Shirley Denison. Members of the Board of Trustees: J. B. Clarke, Q.C., Goodwin Gibson, R. J. Maclellan, W. E. Middleton, H. M. Mowat, D. W. Saunders and C. D. Scott. Auditors: A. W. Anglin and A. T. Kirkpatrick. Members of the Committee on Legislation: John Hoskin, Q.C., LL.D.; E. D. Armour, Q.C., D. E. Thomson, Q.C., T. Langton, Q.C., D. W. Saunders, Douglas Armour, W. H. Blake, W. E. Middleton, E. T. English, C. A. Masten, W. D. Macpherson and A. T. Kirkpatrick.

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#### CARLETON LAW ASSOCIATION REPORT, 1898.

The members on the roll of the association number 72 (including three honorary members), being an increase of 14 over last year.

The annual fees paid amounted to \$240. The stock taken by new members was \$150, of which half the amount, viz., \$75, was paid, the balance being payable in 1899. The grant from the Law Society of Upper Canada was \$470, and that from the Ontario Government was \$52.63. These sums, with \$7.89 interest credited by the bank, amounted in all to \$845.52.

The sum of \$439.60 has been expended in the purchase of books, and after the other expenses of the association have been paid, a balance of \$197.10 remains in the treasurer's hands; 108 volumes have been added to the library during the year, the total number of books now being 1,683, the value of which is about \$5,485.54, on which the insurance of \$3,000 has been kept in force. The librarian reports that no books have been lost during the year.

The committee appointed at the last annual meeting to interview the County Council as to better accommodation

for the library, did so, but the Council declined to do anything. The growth of the library has necessitated an addition to the shelving, which has been made during the year. A telephone has also been placed in the library, and it has proved a great convenience to the members. The salary of the librarian has been increased to \$30 per month during the year.

Mr. Gorman has presented to the association a copy of Murray's Interest Tables, and also a portrait of ex-Judge Ross, which has been hung in the Judge's chambers. Mr. Lees has presented a portrait of the late Robert Lees, Q.C., the first president of the association, which has been hung in the library.

In the month of May last, the annual meeting of the Canadian Bar Association was held at Ottawa, and a luncheon was given in their honour by the Bar of Ottawa at the Hotel Victoria, Aylmer, at which about 80 persons were present.

In the month of September last the Inspector of County Law Libraries visited our library, but no member of the board had been advised of his coming, or was aware of his visit until after his departure. His report, however, expresses his satisfaction with the condition of the library, and especially with the work of the librarian in noting up the decisions and the amendments to the statutes.

In the month of December Mr. R. E. Gemmell, who had so satisfactorily filled the office of secretary of the association for the past five years, resigned that position, in consequence of his removal to St. Paul, Minn. At a meeting of the association held on 30th December, 1898, a committee was appointed, who prepared a suitable resolution, and had same engrossed and forwarded to Mr. Gemmell. At the same meeting Mr. Edmund F. Burritt was appointed secretary for the balance of the year.

The following officers were elected for the year 1899 : President, M. J. Gorman; vice-president, J. I. MacCracken; treasurer, J. F. Orde; secretary, E. F. Burritt; trustees, W. D. Hogg, Q.C., J. Bishop, R. G. Code, R. V. Sinclair and W. A. D. Lees.

# THE CANADIAN LAW TIMES.

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MARCH, 1899.

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## HAS MALICE ANY PLACE IN CIVIL WRONGS.

THE accepted definition of Malice is that given by Mr. Justice Bayley in *Bromage v. Prosser* (a), "Malice," he says, "in common acceptance means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally without just cause or excuse." This definition requires to be re-cast to make sense. Malice cannot mean a wrongful act, or an act of any kind; no judicial straining of interpretation can make the word connote anything that is not a mental state. "Malice means a state of mind," says Lord Esher in *Nevill v. Fine Arts, etc., Insurance Co.* (b). We may, then, without altering the real meaning, state Mr. Justice Bayley's definition in the following form: "Malice means the intention, without just cause or excuse, of doing a wrongful act." The definition may be further simplified by leaving out the words "without just cause or excuse," for if the intention has just cause or excuse it cannot by any possibility be rightly called malicious; that which is just and excusable cannot be malicious. We arrive, then, at this definition: "Malice means the intention of doing a wrongful act."

Let us see now how malice, as one of many possible states of mind, has been treated in the recent case of *Allen v. Flood* (c). Although "motive" and "intention" are distinct, the one being the impelling force, and the other the aim to which the mind is impelled, the two are not distinguished by

(a) 4 B. & C. 247.

(b) 14 Reports, 587.

(c) L. R. (1898) A. C. 1.

any of the noble Lords in their judgments, but are used indiscriminately to signify the same thing. The distinction is a very real one, but for the purposes of the question under consideration it may be passed over, and throughout the judgments of the noble Lords the words "motive" and "intention" may be taken to mean "state of mind."

Broadly stated, *Allen v. Flood* decides that the law does not regard the state of mind of the actor in considering the lawfulness or unlawfulness of a civil act.

Lord Watson says: "Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrongs." And again he says: "The existence of a bad motive, in the case of an action which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due." Lord Herschell says: "It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the question of conspiracy, which is anomalous in more than one respect." Lord Macnaghten sets out by saying: "I am not sure that I know what they (the jury) meant by the word 'maliciously.' Sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself." Further on he says: "I should be disposed to hold that if a right has been knowingly violated, an allegation of malice is superfluous, and that if there has been no violation of any right, malice by itself is not a cause of action." Lord Shand says: "His action being lawful, and no unlawful means being used to carry it out, the motive, even if it be personal ill-will to another, would not, in my opinion, create liability to a claim of damages." Later, he says: "I agree with those of your Lordships who hold that, even if such a motive had existed in the mind of the defendant, this would not have created liability in damages." Lord Davey says: "The proposition of those learned Judges (the Court of Appeal), when analysed, seems to me to amount to this, that *damnum absque injuria*, if accompanied by malicious intent, will give a right of action, or that malicious motive *per se* amounts, or may in certain circumstances amount,

to injuria. I am unable to assent to either of these propositions. It humbly appears to me to be against sound principles to hold, that the additional ingredient of malice should give a right of action against an individual for an act which, if done without malice would not be wrongful, although it results in damages to a third person."

These extracts appear conclusive on the point of law generally—that the law pays no regard to the state of mind of the actor—and it remains to show that the same rule holds in the special case of defamation, and that here malice is not a necessary ingredient.

In *Nevill v. Fine Arts, etc., Insurance Co.*, Lord Esher states the well-known rule in the following terms: "It does not signify what the motive or intention of the person publishing the libel is, because the law implies malice from the fact of publication." In other words, the motive is not considered at all. That this is the conclusion to be drawn is further clear from the fact that (apart from the privilege, to be considered later), if the defendant proves conclusively that his state of mind could not be described as "malicious" it will avail him nothing. If, then, the law goes on to imply what is not of necessity there, namely malice, and which may be proved not to be there, why should "that unhappy expression" be used at all? It is an embarrassing redundancy of expression to state that the words were "falsely and maliciously published." But, in truth, nothing is gained by supposing the existence of a state of mind which may or may not exist, and not only may the word "maliciously" be left out, but the whole fiction of its existence may be banished from the legal conception of defamation, and the plaintiff recover damages for the violation, through the publication of falsehood, of his right to his good name. There remains the excuse or defence of privilege, as to which the rule of law is that it can only be pleaded when it can be shown that the publication was made without actual malice. Here again we gain by dispensing with the idea of malice, and the real point of excuse is brought out by substituting for it the idea of overstepping the bounds of duty. If the defendant exceeds his duty he is not allowed the excuse of privilege; neither malice nor any other state of mind has anything to

do with it; it is simply a question of action. Did the defendant do more than he was in duty bound to do? The judgments in *Allen v. Flood* touch on this point. Lord Herschell says: "Some of the learned Judges cite actions of libel and slander as instances in which the legal liability depends on the presence or absence of malice. I think this is a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class of cases the law, under certain circumstances, regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates privilege, then, though the person making the statements may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory."

And Lord Davey says: "The case of libel on a privileged occasion is of course altogether different. A libel is held to be excused if the words complained of were used on a privileged occasion. But that excuse may be rebutted by proof of express malice and abuse of the privilege. In my opinion, the somewhat anomalous action for malicious prosecution is based on the same principle. From the motives of public policy the law gives protection to persons prosecuting, even when there is no reasonable or probable cause for the prosecution. But if the person abuses his privilege for the indulgence of his personal spite, he loses the protection, and is liable to an action, not for the malice, but for the wrong done in subjecting another to the annoyance and expense of a causeless prosecution."

In *Weatherston v. Hawkins* (*d*), a libel action, counsel quoted Noy, 35, "The want of the word 'malitiose' was held to be no error."

It may be remarked in conclusion, that even the accepted definition of malice by Mr. Justice Bayley fails.

(*d*) 1 T. R. 110.

An act may be done with the intention of doing another wrong, and yet the element of malice may be entirely absent, because the act may be dictated by motives of self-interest without a trace of ill-will. Here the distinction between "motive" and "intention" comes out strongly. Take, as an illustration, a "trust" combine. To endeavour to define such actions, in which no element of ill-will enters, as malicious in a legal sense, is to divorce entirely words from their accepted meaning.

Judges have for many years tried to get round this difficulty by means of an absurd fiction; it is to be hoped we are now on the high road to abolishing the fiction altogether.

Since the above was written, the case of *Hubbuck v. Wilkinson* (e) has been reported. There, Lindley, M.R., applied the decision in *Allen v. Flood* directly to the case of libel or disparagement of goods. He says, "It is not unlawful to say that one's goods are better than other people's, and *Allen v. Flood* shows that malice in such a case is immaterial.

A. R. COLLES.

Calgary, N.W.T.

(e) L. R. (1899) 1 Q. B. at p. 91, 92.

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## HISTORICAL ACCOUNT OF THE COURTS OF JUDICATURE IN NOVA SCOTIA.

*(Continued.)*

On the 15th May, 1750, we find the Council called upon to act judicially in another capacity, that is to say as a Court of Marriage and Divorce. Lieut. William Williams complained that his wife had been guilty of adultery, and prayed that she might be brought to trial, and if his allegations were made good, to grant him a divorce. The question was put whether the Council could try such cases as properly belonging to the Spiritual Courts. It was declared in the affirmative. The parties with a number of witnesses were heard before the Court and the wife found guilty. The divorce was unanimously granted. The Secretary was ordered to have an instrument of divorce drawn up by persons conversant in the Spiritual Court by which Lieut. Williams shall be at liberty to remarry, but Amy Williams should not have power during the said William's life. The said Amy Williams was further ordered to quit the province within ten days. The mode in which the Court sitting as a Court of Marriage and Divorce exercised their powers on this occasion was subsequently disapproved of by the Home authorities as not conformable to English law and practice then prevailing.

There are numerous other instances of trials before the General Court in all kinds of cases, both criminal and civil, which it would not be useful to notice at any greater length. The foregoing have been given as illustrations of the proceedings in the early judicial annals of the Province to indicate the mode in which the Courts wielded their authority and the extent of the jurisdiction they assumed. Those who may be curious on the subject will find many others, and some quite interesting, recorded at length in the early record books of the General Court now preserved in the archives.



The chief ministerial officer of the Court at this period was styled Provost Marshal, and not High Sheriff as now. He executed by himself and his deputies all processes and orders of the Courts not only in Halifax, but all over the Province, and continued to do so until an Act of the Legislature was passed in 1778, assented to in 1780, abolishing his office and providing for the appointment of sheriffs in each of the counties. From the proceedings of the House of Assembly, I gather that there was great oppression and possibly extortion in the exercise of the office which led to loud complaints. The British authorities, however, listened to the petition of the Provost Marshal Fenton, and would not allow the Act until a pension was provided for him out of the Provincial revenues. Chapter II., Statutes of 1778, in the preamble, explains the reason for the change from Provost Marshal to Sheriffs.

At the first institution of the Courts the officer now known as Prothonotary and clerk of the Crown was styled the Chief Clerk. I have not ascertained precisely when the change in title was made, possibly after Chief Justice Belcher was appointed. The title is peculiar to Nova Scotia, as I do not find among the other English speaking provinces that it has been adopted, and it was no doubt so changed to correspond with similar title given to the Chief Clerks in the Courts of the King's Bench and Common Pleas in England. A Mr. Thompson enjoyed the emoluments of the office and resided in England. His duties were performed by Mr. Nutting as deputy. On the death of Thompson, Mr. Nutting succeeded to his place, and at that time and until a comparatively modern date all the country Prothonotaries were simply his deputies.

This was not changed until the year 1853, when an Act was passed by which "the office of Prothonotary of the Supreme Court," and also the office of Clerk of the Crown for the *whole province* was abolished and the Governor-in-Council was authorized to appoint a Prothonotary and Clerk of the Crown for each county in the province, but reserving a certain proportion of the fees for Mr. Nutting, who held his office under letters patent. This reservation of course

ceased at his death, and all the Prothonotaries and Clerks of the Crown are entitled to retain all fees of office.

From what has already been said, it has been shewn that at the first settlement of the province the Governor and Council were the supreme legal tribunals, and further held both legislative and executive authority. That among their first acts was one to qualify themselves for their functions by taking the appointed oaths of office, and subsequently entering upon their duties by trying such civil and criminal cases as came before them, and further that they conducted their proceedings on the basis of English law and precedent. But, in the nature of things, it was impossible in view of other important business they could continue to transact all the judicial affairs arising in the Colony. I have already mentioned the names of several persons who were commissioned as Justices of the Peace. Their authority at that time was similar to that belonging to the office in England, and did not extend, as in later times, to the trial of civil causes or actions for the collection of debts not exceeding a specified sum. It may be well to mention here that Justices' civil jurisdiction was first conferred by Act of the Legislature 14 & 15 Geo. III. cap. 15, Acts of 1774, and has since been extended largely.

On the 6th December, 1749, the Council first turned their attention to the subject of laws for the Province and for regulations for the General Court and County or Inferior Courts. Messrs. Green, Salisbury and Davidson were named as a committee to examine the laws of the Plantations and the regulations with regard to them and report. On the 13th December they presented the result, which was read before the Council. The record says: "The report being read accordingly, was approved by the Council, nem. con., and ordered to be entered in the Council books immediately after the 9 articles of His Majesty's instructions relating to the Courts of Justice, which, by article 82, are ordered to be made public, and registered in the Council books."

His Majesty's instructions so ordered to be registered are of considerable length. The following is the report:

“The Committee are of opinion that the form of Government in Virginia, being the nearest to that of Nova Scotia, the regulations there established for the General Court and their County Courts will be the most proper to be observed in the province. The Committee have therefore collected from the laws of Virginia the following regulations with regard to the General Court and the County Courts, and the forms to be observed therein.

#### THE GENERAL COURT.

Article 1st. For the more easie and regular Prosecution and Determination of suits and actions in the General Court, the Committee humbly propose that it be established and declared that all Original Process (either by writ, summons, or other means to bring any person to answer any action, information, bill or plaint in the General Court, and all executions and all attachments awarded by the General Court, subpoenas and all other process whatever belonging to any matter prosecuted in the General Court be issued from the Secretary's office signed by the Clerk of the Court and also be returned unto the same office.

2. That no person shall take original process for the trial of any suit in the General Court of less value than ten pounds sterling on penalty of having such suit dismissed and paying costs.

3. That no member of His Majesty's Council of this province be sued in an Inferior Court, but that all actions against them shall take their risk and be prosecuted before the General Court, and the process be the same as in Virginia.

4. That all Process whatever returnable to the General Court be executed at least ten days before the day mentioned therein for the Return.

5. That Criminal causes be tried the first day of the sitting of the General Court, and no writs be returnable that day.

6. That on the commitment of any person for any capital or criminal offence, the Magistrate making such commitment shall cause all the witnesses of the fact that shall come to

his knowledge to enter into Recognisance of their appearance to give evidence viva voce upon the trial of such offender, all which Recognisance to be delivered to the Clerk three days before the Court sits.

7. That the Clerk of the General Court shall not issue writs, subpoenas or other original Process for more than twelve actions returnable to any one day of the General Court, neither shall he issue such Process returnable to any, unless they shall have theretofore issued Process for twelve suits returnable to every proceeding day of that General Court.

8. That if upon issuing of a Writ to the Provost Marshal for attaching the body of any person to answer to any suit, if the Provost Marshal shall return bail taken for his appearance and such person fail to appear, then judgment shall be given against the Bail, and if the Provost Marshal shall not return good Bail and the Defendant shall fail to appear, then Judgment shall be given against the Provost Marshal. Provided always that the Bail or the Provost Marshal have liberty to make the same Defence that the Principal defendant might have had. And provided likewise that upon the motion of the Bail or Provost Marshal, it be a rule of the Court to order an attachment to issue against so much of the estate of the Defendant as shall be of value sufficient to satisfy such judgment and all costs and charges.

9. That in all cases where witnesses are to appear at the General Court, a summons be issued for the same by the Clerk of said Court, especially mentioning the time and place where the witnesses are to appear and the names of the parties to the suit wherein they are to give evidence and at whose request they are summoned.

10. That a person failing to appear on such summons be fined in five pounds sterling.

11. That if it appear by certificate from a Justice of the Peace that a Witness is incapable of appearing by reason of age, sickness or other lawful Disability, in this case the Court shall commission one or more persons to take such Person's

affidavit. Provided always that such commission be made known to the other party.

12. That if any person summoned as a witness upon appearance before the General Court or before persons appointed (as above) to take affidavits, shall refuse to give evidence upon oath, that such person be immediately committed to the Common Goal there to remain without bail or mainprise until willing to give evidence upon oath.

13. That no writ of any kind be served against any person summoned as a witness during his attendance thereupon, or in the time of his going to or returning from such attendance.

14. That Appeals from the County Court be heard the third day of sitting.

15. That upon an appeal in any personal action, if the sentence appealed from affirmed in the General Court, then the appellant shall besides the principal sum expressed in the sentence, pay for the use Poor a Fine not exceeding 15 per cent. upon the principal sum and costs according as the Court shall think fit, and upon appeals in real actions, instead of 15 per cent. where the sentence appealed from is affirmed, the applicant shall pay the Poor a sum not exceeding ten pounds sterling.

That for the more easie and regular prosecution of all cases in the General Court, and for the more exact entering of the Judgments of the Court and for the preservation of the Records thereof, the following Rules be observed:

Rule 1. That every Plaintiff shall file his Declaration three days before the day whereto the Writ is returnable. If no declaration is filed before that time, but yet be filed before the day of the Return, the Defendant shall of course have one day more than could otherwise have been allowed, and if no Declaration is filed before the day of the return, then the plaintiff shall be nonsuit.

2. If the plaintiff fails to appear and prosecute the suit he shall be nonsuit.

3. That the Defendant prepare his Plea in writing to the Declaration of the Plaintiff.

4. That the Clerk carefully preserve the Declaration, Pleas, and all other Papers, and that they be all filed together in the office.

5. That in all cases where the title of any estate in Land is determined, the pleadings shall be all in writing and shall be entered at large with the Judgment thereupon in particular Books set apart for that purpose only.

6. That all proceedings in Pleas of the Crown Criminal cases and matters relating to the Public Revenues be recorded in Particular Books set apart for that purpose.

7. That for the more regular Prosecution of cases Two or more Attorneys be appointed, sworn and their fees regulated.

8. That every person be allowed to speak himself in his own cause, or produce one to speak for him, or desire the Court to name one.

9. That no person take any fee or gratuity whatever for speaking in any cause.

#### THE COUNTY COURT.

The Committee humbly proposes that there be established a County Court consisting of five or more Justices by Commission from His Excellency under the seal of the Province any thereof which Justices shall be sufficient to hear and determine all causes which shall belong to such County Court.

That the Justice of the County Court have full power, authority and jurisdiction to hear and determine all causes whatsoever cognizable at Common Law or, except such criminal causes wherein the judgment upon conviction shall be for the Loss of Life or member and except the prosecution of causes to Out-Lawry against any person, and also except all causes of less value than twenty shillings be declared cognizable and finally determinable by one Justice of the said County Court.

That the County Court be held monthly the first Tuesday of every month, and do sit from day to day till all causes that come before them are determined.

That the first Justice in the Commission be authorised to call special Court when he thinks necessary for the sake of

merchants and others from distant places, whose stay might be very prejudicial to their affairs.

That all original Process and writs of all kinds to bring Persons to answer any suit or action in the County Court, and all executions and attachments awarded by the said Court, shall be issued by the Clerk of the Court, and shall be again returned to the same office whence they were issued.

That for the more regular granting of appeals from the County Court, it be declared that when any person prays an appeal to the General Court such person before such appeal be granted shall give Bond with good and sufficient security for the prosecuting the same with effect, and to perform the judgment of the General Court and to pay Damages if the judgment of the County Court shall be affirmed, in manner following, to wit, in all personal and mixt actions the damages, fifteen per cent. upon the Principal sum and costs ordered to be paid by the judgment of the County Court, and in every Relation the damage shall be ten pounds over and above all costs and damages ordered to be paid by the judgment of the County Court.

That no appeal be granted from County Court to the General Court for any sum less than five pounds sterling.

That all the Regulations and Rules of Court be the same in County Court with those formerly mentioned in the General Court. The following rules to respect both the General Court and the County Court.

That if any difficulty shall arise in explaining any of the above rules and regulations that Recourse be had for explanation to the Laws of Virginia, whence most of them are derived, particularly an Act entitled An Act for establishing the General Court, pp. 251 to 260, and an Act entitled An Act establishing County Courts, p. 332 to p. 338."

**EXTRACT FROM ROYAL INSTRUCTIONS TO PEREGRINE THOMAS HOPSON, CAPTAIN-GENERAL AND GOVERNOR, DATED MAY 7TH, 1752.**

Manuscript Documents, No. 348.

**AND WHEREAS** for the Peace, Happiness and Security of all His Majesty's Subjects within the said Province, and

for the more speedy and easy execution of Justice and Determination of all controversies and differences, it is necessary that Courts of Judicature and publick Justice should be erected, and also a Judge, or Assistant Justice of the Peace, Sheriffs and other officers should be appointed according to the Powers and Directions of His Majesty's Commission and these Instructions; It is therefore His Majesty's Will and Pleasure, that one principal Court of Judicature should be held twice a year or oftener as you shall judge expedient by the Name of the General Court, and to have Jurisdiction of all causes Real and Personal at common law above the value of five pounds, to act as a Court of Chancery, but not without appeal to His Majesty when the matter in Question shall exceed three hundred Pound Sterling, as also to try all criminal cases that may come before the said General Court, which said Court, It is His further Will and Pleasure should consist of the Governor or Commander-in-Chief and the Council of the said Province for the time being, any five whereof to be a quorum.

AND IT IS HIS MAJESTY'S FURTHER WILL AND PLEASURE, and you are hereby authorized and required to constitute and appoint such and so many inferior courts of Judicature and Justice within the said Province as you by and with the advice and consent of the said Council shall judge most proper, as also Judges, Justices of the Peace, Sheriffs and other Officers and Ministers of Justice; taking care that you do administer or cause to be administered to all and every such Person as are usually given for the due execution of Offices and Places, and the impartial administration of Justice, and in the choice and nomination of said Judges, Justices, Sheriffs and other Officers; you are always to take care that they be of good life and well affected to His Majesty's Government, and of good Estates and abilities and not necessitous Persons.

AND you are to transmit to His Majesty's Commissioners for Trade and Plantations with all convenient speed a particular account of all establishments of Jurisdictions, Courts, Offices, and Officers, Powers, Authoritys, Fees and Privileges granted and settled within the said Province; as likewise an account of all publick Charges relating to the said Courts



and of such Funds as are settled and appropriated to discharge the same; together with exact and authentic copies of all Proceedings in such Causes where appeals shall be made to His Majesty in His Privy Council.

You shall not displace any of the Judges, Justices, Sheriffs or other Officers or Ministers within the said Province already appointed, without good and sufficient cause so signified unto His Majesty's Commissioners for Trade and Plantations; and to prevent arbitrary Removals of the Judges and Justices of the Peace, you are not to express any limitation of time in the Commissions, which you are to grant to Persons fit for those Employments, nor shall you execute by yourself or by Deputy any of the said Offices.

AND you are with the advice and consent of the Council to take especial care to regulate all salaries and Fees belonging to Places or paid upon Emergencies that they be within the Bounds of Moderation, and that no exactions be made on any occasion whatsoever; as also that Tables of all Fees be publicly hung up in all Places where such Fees are to be paid, and you are to transmit copies of all such Tables of Fees to His Majesty's Commissioners for Trade and Plantations, as aforesaid.

AND whereas frequent complaints have been made of great Delays and undue Proceedings in the Courts of Justice in several of the Plantations, whereby many of His Majesty's subjects have very much suffer'd, and it being of the greatest importance to His Majesty's Service and to the Welfare of the Plantations, that Justice be everywhere speedily and duly administered, and that all Disorders, Delays and other undue Practices in the administration thereof be effectually prevented; You are particularly required to take especial care that in all Courts where you are authorized to preside, Justice be impartially administered, and that in all other Courts established within the said Province all Judges and other Persons therein concerned do likewise perform their several Duties without Delay or Partiality.

YOU are to take care that no Court of Judicature be adjourned but upon good grounds; as also that no Orders of any Court of Judicature be entered or allowed which shall

not be first read and approved of by the Magistrates in open Court, which Rule you are in like manner to see observed with Relation to the Proceedings of the said Council, and that all orders there made be first read and approved in Council before they are enter'd upon the Council Books.

WHEREAS His Majesty is above all things desirous that all His subjects may enjoy their legal Rights and Properties, you are to take especial care that if any Person be committed for any criminal matters (unless for Treason or Felony plainly and especially express'd in the Warrant of Commitment) he have free Liberty to petition by himself or otherwise for a writ of Habeas Corpus, which upon such application shall be granted and served on the Provost Marshal, Gaoler or other Officer having the custody of such Prisoner, or shall be left at the Gaol or Place where such Prisoner is confined, And the said Provost Marshal or other Officer shall within three days after such service (on the Petitioner's paying the Fees and Charges, and giving security that he will not escape by the way) make return of the Writ and Prisoner before the Judge who granted out the said Writ, and there certify the true cause of the Imprisonment, and the said Judge shall discharge such Prisoner, taking his Recognizance and Security for his appearance at the Court where the offence is cognizable, and certify the said Writ & Recognizance into the Court, unless such offences appear to the said Judge not bailable by the laws of England.

AND in case the said Judge shall refuse to grant a Writ of Habeas Corpus, on view of the copy of commitment, or upon Oath made of such Copy having been denied the Prisoner, or any Person requiring the same in his behalf, or shall delay to discharge the Prisoner, after the granting of such Writ, the said Judge shall incur the Forfeiture of his Place.

YOU are likewise to declare His Majesty's pleasure that in case the Provost Marshal or other officer shall imprison any person above twelve Hours, except by a mittimus setting forth the Cause thereof, he be removed from his said Office.

AND upon the application of any Person wrongfully committed the Judge shall issue his Warrant to the Provost

Marshal or other Officer to bring the Prisoner before him, who shall be discharged without Bail or paying Fees, and the Provost Marshal or other Officer refusing Obedience to such Warrant shall be thereupon removed; and if the said Judge denies his warrant, he shall likewise incur the Forfeiture of his Place.

YOU shall give directions that no Prisoner being set at large by an Habeas Corpus be recommitted for the same Offence, but by the Court where he is bound to appear, and if any Judge, Provost Marshal or other Officer contrary hereunto shall re-commit such Person so bail'd or deliver'd, You are to remove him from his Place; and if the Provost Marshal or other Officer having the Custody of the Prisoner neglects to return the Habeas Corpus or refuses a copy of the Committment within six Hours after Demand made by the Prisoner or any other in his behalf, he shall likewise incur the Forfeiture of his Place.

YOU are to take care that all Prisoners in cases of Treason or Felony have free Liberty to petition in open Court for their Tryals, that they be indicted at the first Court of Oyer and Terminer, unless it appears upon oath that the witnesses against them could not be produced and that they be tryed at the second Court or discharged, and the Judge, upon motion made the last Day of the Sessions in open Court shall discharge the Prisoner accordingly, and upon the refusal of the said Judge and Provost Marshal or other Officer to do their respective Dutys herein they shall be removed from their places.

PROVIDED always that no Person be discharged out of Prison who stands committed for Debt by any Decree of Chancery or any legal Proceedings of any Court of Record.

AND for the Preventing of any Exactions that may be made upon Prisoners, you are to declare His Majesty's Pleasure that no Judge shall receive for himself or Clerks for granting a Writ of Habeas Corpus more than two shillings and sixpence, and the like sum for taking a recognizance; and that the Provost Marshal or other Officer shall not receive more than five shillings for every committment, one shilling and three pence for the Bond the Prisoner is to sign,

one shilling three pence for every copy of a Mittimus and one shilling and three pence for every mile he bringeth back the Prisoner.

AND further, you are to cause this His Majesty's Royal Pleasure signified to you by the Nine Articles of Instructions immediately preceding this, to be made publick and registered in the Council Books of the said Province.

YOU are to take care that no man's Life, Member, Freehold or Goods be taken away or harmed in the said Province under your Government, otherwise than by established and known Laws, not repugnant to, but as near as may be agreeable to the Laws of this Kingdom, and that no Persons be sent as Prisoners to this Kingdom from the said Province without sufficient Proof of their Crimes, and that Proof transmitted along with the said Prisoners.

YOU are to take care that all Writs within the said Province be issued in His Majesty's name.

YOU shall take care with the advice and assistance of the Council that proper Prisons be forthwith erected and put into and kept in such a condition as may sufficiently secure the Prisoners that are or shall be there in Custody.

WHEREAS Appeals ought to be made in cases of error from the respective Courts in the said Province unto you and the Council there in General Court, and in your absence from the said Province to the Lieutenant-Governor or to the Commander-in-Chief for the time being, and the said Council in civil causes, if either party shall not rest satisfied with the Judgment of you or the Commander-in-Chief for the time being and Council as aforesaid, His Majesty's Will and Pleasure is that they may then appeal unto His Majesty in His Privy Council; Provided the Sum or Value so appealed for unto His Majesty do exceed three hundred Pounds sterling, and that such Appeal be made within fourteen days after Sentence and good security be given by the Appellant that he will effectually prosecute the same and answer the condemnation, as also pay such Cost and Damages as shall be awarded by His Majesty in case the sentence of you or the Commander-in-Chief for the time being and Council be affirmed; And it is His Majesty's further Will and Pleasure

that in all cases where by your instructions you are to admit Appeals to His Majesty in His Privy Council, execution be suspended until the final determination of such Appeal, unless good and sufficient Security be given by the Appellee to make ample Restitution of all that the Appellant shall have lost by means of such Judgment or Decree in case upon the Determination of such Appeal such Judgment or Decree should be reversed and Restitution awarded to the Appellant.

EXTRACT FROM ADDITIONAL INSTRUCTIONS TO GOVERNOR  
HOPSON, 18TH DECEMBER, 1753.

Manuscript Document No. 348.

George R.

ADDITIONAL INSTRUCTION to our Trusty and Well-beloved Peregrine Thomas Hopson, Esquire, our Captain-General and Governor-in-Chief in and over Our Province of Nova Scotia or Acadie in America, or to the Commander-in-Chief of our said province for the time being. Given at Our Court at St. James's the 18th day of December, 1753, in the Twenty-seventh year of Our Reign.

WHEREAS it hath been represented unto us, that the Method prescribed by the Instructions heretofore given by Us to the Governors of Our ..... and Plantations in America, relative to appeals from the Courts there in Cases of Error, has, by subsequent Regulations which have been from time to time made by Us in Our Privy Council relative to such Appeals, become defective and improper, For Remedy thereof for the future, IT IS OUR ROYAL WILL AND PLEASURE that you or the Commander-in-Chief of Our Province of Nova Scotia for the time being do permit and allow appeals from any of the Courts of Common Law in Our said Province unto you or the Commander-in-Chief and the Council of Our said Province; and you are for that purpose to issue a Writ in the manner which has been usually accustomed, returnable before yourself and the Council of Our said Province who are to proceed to hear and determine such Appeal, wherein such of Our said Court....  
.....shall be at that time Judges of the Court .....  
such Appeal shall be so made to you our Captain-General or

to the Commander-in-Chief for the time being and to Our said Council as aforesaid, shall not be admitted to vote upon the said Appeal; but they may be nevertheless be present at the hearing thereof, to give the reasons of the Judgment given by them in the Causes wherein such Appeals shall be made; PROVIDED, nevertheless, that in all such Appeals the sum or value appealed for do exceed the sum of three hundred pounds sterling, and that security be first duly given by the Appellant to answer such Charges as shall be awarded, in case the first sentence is affirmed. And if either party shall not rest satisfied with the judgment of you or the Commander-in-Chief for the time being and of Our Council as aforesaid, Our Will and Pleasure is that such Party may then appeal unto Us in Our Privy Council. Provided the sum or value so appealed for unto Us do exceed five hundred pounds sterling, and that such Appeal be made within fourteen days after Sentence, and good security given by the Appellant that he will effectually prosecute the same and answer the condemnation, and also pay such Costs and Damages as shall be awarded by Us in case the sentence of you or the Commander-in-Chief for the time being and of Our Council be affirmed; PROVIDED, nevertheless, that where the matter in question relates to the taking or demanding of Duty payable to us or to any Fee of Office, or annual Rent, or other such like matter or thing where the rights in future may be bound, in all such cases you are to admit an Appeal to Us in Our Privy Council, altho' the immediate sum or value appealed for be of less value. And it is our further Will and Pleasure that in all Cases where by your Instructions you are to admit Appeals to Us in Our Privy Council, execution be suspended, until the final Determination of such Appeals, unless good and sufficient security be given by the Appellee to make ample Restitution of all that the Appellant shall have lost by means of such Judgment or Decree, in case, upon the Determination of such Appeal, such Decree or Judgment should be reversed and Restitution awarded to the Appellant.

G. R.

*(To be Continued.)*

CHARLES J. TOWNSEND.

## EDITORIAL REVIEW.

**Interruptions of Counsel.**

Interruptions of Counsel during the course of arguments will never cease, although much may be said and written against them ; nor is it desirable that they should altogether cease. But there are interruptions, and interruptions. Nothing is more trying than to argue a case before a Court that is absolutely silent. When there is no intimation one way or the other, Counsel is absolutely unaware of what impression he is making, or if indeed he is making any. There is an interruption that aids an argument, that shows that the Judge is submitting himself to the line of argument addressed to him ; he adds force to it by additional suggestions ; or he tests it by another process ; or he asks whether assumed facts are in reality facts. A litigant has surely a right to have the Court lend itself completely to his line of argument. Then there is the interruption that destroys an argument. Counsel are interrupted in the middle of a sentence ; the Judge will not accept a proposition—so far only half stated—because of a difficulty, real or imaginary, suggested by himself. He never gets the real argument fairly presented ; has never realized the strength of the case presented ; has never been steeped in the line of thought presented to him. These remarks are suggested by a review of the Law in 1898 in "The Times" of 28th December last, evidently written by a close observer. With regard to this particular matter, he says:—"The Judges themselves and their methods have recently, in an unusual degree, been the objects of criticism. The weighty words of Lord Hatherley, quoted the other day by a correspondent in these columns, express, unfortunately, an extinct tradition. Few of the Judges—those

in the House of Lords least of all—‘form a covenant’ with themselves ‘to let every matter be fully placed before’ them ere forming an opinion, much less pronouncing a decision. The Counsel who appear at the Bar of the House have probably been soaked in the case under appeal for a full year and ought to know how to unfold their argument, as they are entitled, to the best advantage of their client. It is more than trying, therefore, to have the thread of their discourse interrupted, as it constantly is, by two or three Lords simultaneously, each starting his own difficulty. There is no want of patience or courtesy, and sooner or later the advocate is able to get in what he wants to say. But the practice is not orderly—a legal argument cannot be satisfactorily conducted on the principle of a part-song, and the inevitable result is delay and repetition. In some instances, too, this innovation is a grave hindrance to justice. A case of *Lory v. Arnold*, before Mr. Justice Ridley, on April 29, will serve as an illustration. The action was for commission on the sale of a yacht. Before the defendant’s case was opened, and during the cross-examination of one of the plaintiff’s witnesses, the Judge said, ‘I think you are jockeying this man out of his commission.’ Defendant’s Counsel protested, and said that his client had already paid one commission. ‘I ought not to have said that,’ replied the Judge, ‘but I think the plaintiff is entitled to his commission’, and verdict and judgment went for the plaintiff. The result may or may not have been right. It is not in human nature that the defendant should think it was right, or that the case had been fairly tried.”

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## BOOK REVIEWS.

*Principles of the Criminal Law.* A concise exposition of the nature of crime, the various offences punishable by the English Law, the Law of Criminal Procedure, and the Law of Summary Convictions. With a table of offences, their punishments and Statutes, Table of Cases, Statutes, etc. By SEYMOUR F. HARRIS, B.C.L., M.A. (Oxon.), author of "A concise digest of the Institutes of Gaius and Justinian." Eighth edition. By CHARLES L. ATTENBOROUGH, of the Inner Temple, and of the Midland Circuit, Barrister-at-Law. London: Stevens & Haynes. 1899.

This book appears with unwavering regularity and maintains its place as a standard and concise work on Criminal Law.

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*The Law of Principal and Surety.* By S. A. T. ROWLATT, M.A., late Fellow of King's College, Cambridge; of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes. 1899.

While the law of principal and surety is in some respects settled, a variety of positions and relations are still the subject of discussion, and the whole subject admits of fresh treatment. A new book is therefore welcome, as presenting the old subjects in the light cast upon it by a fresh mind. This is especially true of the relationship of mortgagor, mortgagee and assignee of the equity of redemption, which contain none of the elements of suretyship for the very obvious reason that the assignee of the equity of redemption is not a debtor to the mortgagee. This assumed phase of the law of principal and surety requires complete revision in this Province, but is dismissed in English cases and in this and other text books as not belonging to that branch of law,

though some of the remedies and consequences mimic those of creditor and surety. The subject necessarily receives short treatments in the English cases, which assimilate the law to that of assignment of leases. The work is a very comprehensive one, though concise and compact, and is well written and arranged.

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*The Elements of Roman Law Summarized.* A concise Digest of the matter contained in the Institutes of Gaius and Justinian, etc., etc. By SEYMOUR F. HARRIS, B.C.L., M.A. Third edition, revised. London: Stevens & Haynes. 1899.

This is an excellent Digest of, but not a substitute for Gaius and Justinian. It affords a bird's-eye view of the whole subject and has references to the original text throughout.

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## CORRESPONDENCE.

**Amendments to the Law.**

*To the Editor of THE CANADIAN LAW TIMES:*

Sir,—Will you allow me space in your journal to advance a plea for the amendment of our law in two particulars.

The first relates to Chattel mortgages. I cannot help feeling very strongly that our present law relating to the requirements of a valid chattel mortgage is in a highly technical, not to say dangerous, condition. The main object of the Act is to protect the public by requiring notice. Its purpose in this respect is identical with that of the Registry Act. A marked difference, however, exists between the provisions of the two Acts. In the case of the Registry Act actual notice is equivalent to registration. That Act recognizes the element "of human fallibility," and provides not only that actual notice shall be equivalent to registration, but that "the registration of any instrument shall constitute notice of the instrument," etc., notwithstanding any defect in the proof for registration, but, nevertheless, it shall continue to be the duty of the Registrar not to register any instrument except on such proof as it required by this Act." A recognition not only of general human fallibility, but of the fallibility of the Registrar. Now, how does the Chattel Mortgage Act proceed? Framed as a preventive of unfair dealing, it is a somewhat curious circumstance that in the present condition of the law upon the subject, it is in many cases a positive instrument of fraud.

In the first place, the Act contains no provision making actual notice equivalent to registration; and, in the second place, as interpreted by its exponential case law, it demands the most rigid observance of every statutory requirement. Absolutely no allowance is made for mistakes.

The following points, which have been decided, will illustrate my meaning: (a) Where the affidavit of bona fides "stated that the deed was not made for the purpose of enabling the Assignor" (instead of "assignee") as required by

the Statute—a palpable verbal slip—“to hold the goods against the creditors, the assignment was held bad; for, though it might be a mere clerical error, the Court, by accepting such an affidavit, might be assisting in an intentional evasion of the Statute.” *Barron & O’Brien Chattel Mortgages, etc.*, p. 292.

(b) If the word is written “creditor” in the affidavit instead of “creditors,” the conveyance is void. *Harding v. Knowlson*, 17 U. C. R. 564.

(c) The omission, by inadvertence, of the signature of the Commissioner is fatal to the Conveyance, even though it is proved that the Oath was in fact duly administered and the security an honest one.

(d) It was held under the Nova Scotia Act that the omission of the date of swearing, and of the words “before me,” was fatal. *Archibald v. Hubley*, 18 S. C. R. 116.

(e) The omission from the jurat of the word “sworn” or “affirmed” is fatal. *Pollard v. Huntingdon*, 16 C. L. J. 168; *Archibald v. Hubley*, sup.

It will be seen from these decisions what a pit-fall for the unwary Chattel mortgagees the present state of the law is. At present an honest creditor may be deprived of property of immense value through the simple omission of a date or signature, or some such trifling error, while the benefit of the mistake very probably accrues to some dishonest sharper who took his subsequent mortgage with full knowledge of the bona fide mistake that had been made in the first conveyance, and to whom in many cases perhaps the knowledge of the existence of that mistake may have been the very inducement to the creation of the second mortgage. I believe it is not putting it too strongly to say that probably at least five per cent. of the chattel mortgages filed would not stand the test of a legal trial of their validity; possibly ten per cent. may be nearer the mark.

The provision requiring an affidavit of bona fides by the mortgagee is of course an extremely salutary one, and any alteration of the law which would admit of its evasion would be greatly to be deprecated.

By reason of the necessity for this affidavit, the case of chattel mortgages is rendered somewhat different from that of land mortgages. The subsequent incumbrancer is entitled, in the former case, to have the assurance under oath of the prior mortgagee that the transaction is a bona fide one.

It would therefore not be sufficient to provide, as in the case of the Registry Act, that actual notice should be equivalent to registration. But while fully recognizing this, the question may well be asked, "Is the present provision, viz.: the nullification of the whole transaction, in case of a trifling inadvertent slip, the only method of dealing with the difficulty?" Surely not. Many more equitable provisions might be proposed. The pivotal idea would be the safeguarding of the interests both of the original mortgagee and of the subsequent incumbrancers.

The writer would be inclined to suggest something of the following kind, viz.: A provision similar to that of the Registry Act making actual notice equivalent to registration, with an additional proviso that in case any irregularity were found to exist in the registered instrument, the subsequent incumbrancer, or anyone interested, might notify the mortgagee in writing of the defect, and unless the mortgagee thereupon perfected the instrument in accordance with the requirements of the Chattel Mortgage Act, within a period of so many days, the instrument should be deemed void as against creditors, etc. A provision of this kind would allow a margin for human fallibility and preclude the possibility of the Act being made an instrument of fraud either by the mortgagee or subsequent incumbrancer.

But whatever form the remedy might assume, it is submitted that a change in the present law is urgently required, and would be warmly welcomed by merchants and the public in general.

The other matter on which I desire to remark is one which I have already brought forward in your Journal. (XVII. C. L. T. 201.) It relates to the erroneous descriptions of the subject of gifts by will. I need not deal with it at any length here, as the position and the cases on the subject are fully discussed in the article in question. The

position in a nut-shell is as follows: A., owning the south-east quarter of lot 1 in the 2nd concession of the Township of Blank, and no other land, devises, "the south-west quarter of lot 1 in the second concession of," etc. (by mistake calling the land the south-west quarter of the lot). B., owning the south-east quarter of lot 3 in the fourth concession of the Township of Blank and no other land, devises "my farm, being the south-west quarter of lot 3 in the fourth concession of," etc., making a similar mistake in the description. As the law stands at present, the former devise is nugatory, and the Courts are powerless to afford relief; while the latter devise is perfectly valid, the Court having no difficulty in correcting the mistake. This state of the law is a pit-fall for testators, who are notoriously careless about exact description of land in their wills. The hardship of such cases has been felt and deprecated by the Judges, at the same time that they felt themselves constrained to enforce it. See *Hickey v. Stover*, 11 Ont. R. 106. A very simple and obvious remedy might be applied in this case. It is indicated by the judgment of the Chancellor in *Hickey v. Stover*. It is clear that the learned Chancellor in dealing with that case felt himself trammelled by the fact that as the law stood there was no warrant for "introducing the assumption that the testatrix meant to devise her own land." No one for a moment doubts that in ninety-nine cases out of a hundred that is the intention actuating a testator when he sits down to make his will; an intention to deal, in his will, with his own property, and not with property belonging to somebody else. The amendment, therefore, which I would suggest is the introduction of that assumption, by legislation, in all cases. A provision to the following effect would probably cover the whole ground, viz.: "Unless an intention to the contrary therein appears, all wills shall be construed as though the subject of every devise or bequest therein contained were immediately preceded by the words 'my property being,' or words to the like effect."

Apologizing for the space occupied.

Yours truly,

F. P. BETTS.

# THE CANADIAN LAW TIMES.

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APRIL, 1899.

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## SEQUESTRATION IN COMMON LAW CASES.

IN the recent edition of Holmsted & Langton's Judicature Act, there is, at page 1041, a discussion of the remedy by Writ of Sequestration, and the conclusion is arrived at, that "it would now seem that writ may be issued to enforce an ordinary judgment or order for payment of money or costs." The authorities cited in support of this proposition are *Slade v. Hulme* (a), and *Hulbert v. Cathcart* (b). It is respectfully submitted that neither of these cases bears out the statement in the text, in so far as it applies to what may still be called "common law" judgments.

The first case cited arose out of a divorce action in the Probate and Divorce Division, in which the co-respondent was ordered to pay damages. The former Court of Probate and Divorce, which was merged in the High Court of Justice, was authorized by Statute to enforce its orders in the same way as the former Court of Chancery. A Writ of Sequestration was issued by the Probate and Divorce Division to enforce this order, and as the co-respondent was entitled to certain trust moneys which were being administered in an action in the Chancery Division, it was held that the latter Division had jurisdiction to order the trust moneys to be paid to the Sequestrator.

In the case of *Hulbert v. Cathcart*, an ordinary judgment was obtained for the payment of a sum of money and costs, and an order was made by a Master in Chambers for

(a) 18 Ch. D. 677.

(b) L. R. (1896) A. C. 470.

leave to issue a Writ of Sequestration to enforce payment of the judgment and costs, but this order was reversed on appeal (c). A fuller reference will be made to this decision hereafter. The plaintiff then made another application for an order for a Writ of Sequestration for the costs alone, under the English Rule 619, which is as follows:—"No subpoena for the payment of costs, and, unless by leave of the Court or a Judge, no sequestration, to enforce such payment shall be issued." This order was made by a Master in Chambers, affirmed by a Judge in Chambers and by a Divisional Court, reversed by the Court of Appeal, but restored by the House of Lords (d).

It will be apparent that neither of these cases is authority for the broad statement above quoted. The decision of the Queen's Bench Division in the latter case (e), clearly shows the distinction between the two orders. Willes, J., who delivered the judgment of the Queen's Bench Divisional Court, after quoting the Rule under which the first order had been made, and discussing whether the Chancery Division still retains the right which the former Court of Chancery possessed, to order Writs of Sequestration to enforce their judgments, continues:—"Assuming, however, that such an order (i.e., by the Chancery Division to enforce its own judgment), can be made, how is it possible to apply it to a common law action? In such an action the judgment is that the party do recover so much, that is, of course, in any way that he can. How can a Master or a Judge have power to fix a time within which he shall recover? The judgment is not an order to pay money; and for a Master to order that the unsuccessful party shall pay the sum recovered within a certain time, is totally to alter the nature of the remedy. There is clearly no power to make such an order."

The question still remains as to the applicability of these decisions to the Province of Ontario. Not only have we no Rule similar to the English Rule 619, giving a special remedy for enforcing payment of costs by sequestration, upon which the decision of the House of Lords in *Hulbert v.*

(c) See L. R. (1894) 1 Q. B. 244.

(d) L. R. (1896) A. C. 470.

(e) L. R. (1894) 1 Q. B. 244.



Cathcart, was based, but R. S. O. cap. 80, sec. 5, provides that "process of contempt for non-payment of any sum of money or for non-payment of any costs, charges or expenses, payable by a judgment or order of the High Court or a Judge thereof, or by a judgment or order of a County Court or a Judge thereof, is abolished."

The English Rule 618, under which the first order in *Hulbert v. Cathcart* purported to have been made, is substantially the same as our old Chancery Order 291 and our former Con. Rule 883, the wording of which has been somewhat altered in the present Con. Rule 859, though the meaning is practically the same. The latter Rule is as follows:—"If a person who is ordered to pay money, neglects to obey the judgment, the Court or a Judge may, upon the application of the party prosecuting the same, at the expiration of the time limited for performance, make an order for a Writ of Sequestration." It was held in *London & Canadian L. & A. Co. v. Merritt (f)*, that a Writ of Sequestration could not issue under this Rule, or under the original Ontario Judicature Act, Rule 339, on an ordinary common law judgment for a debt, it not being an order for payment of a specific sum, and no day being named for payment of it. This case will be referred to at more length hereafter.

Then came the decision of Wilson, C.J., in the case of *London & Canadian v. Morphy (g)*. In that case, the plaintiffs, after obtaining a judgment for a debt, obtained an order from a Judge in Chambers, ordering the defendant to pay the amount due by a day certain, and in default, that a Writ of Sequestration should issue. Default having been made, a Writ of Sequestration issued accordingly, under which the defendant's seat on the Toronto Stock Exchange was seized; and an application was then made for an order that it might be sold, in such manner as the Court should direct. Upon this motion, no objection appears to have been taken to the regularity of the order for the Writ, but the motion for the sale was opposed, and successfully, on the ground that the seat could not be sold without the consent of

(f) 32 C. P. 375.

(g) 10 Ont. R. 86.

the Stock Exchange. Wilson, C.J., however went into the question of the validity of the order for the Writ, and after stating that "the provisions relating to sequestration may be said to be similar in England and in this country," he held that the order was rightly made, and that the Writ of Sequestration was properly issued. It is very doubtful, however, whether the Judge would have arrived at this result, if the point had been fully argued before him, and it at least seems certain that that decision would not now be followed in our Courts, in opposition to the decision of the Queen's Bench Division in *Hulbert v. Cathcart*, above referred to.

Another objection to the order might have been made in the *Morphy* case, viz.: that it purported to provide punishment contingently, for a contempt of Court, which had not yet been committed. This same point arose with regard to the first order made in *Hulbert v. Cathcart*, and Willes, J., in dealing with it said:—"It is quite contrary to principle to make an order in the nature of an order in contempt, as a Writ of Sequestration is, when the person against whom it is made is not in contempt. This order is an order as upon a contempt if a hypothetical case shall become a real one, which is quite contrary to the decision in *Stonor v. Fowle*, 13 App. Cas. 20."

It may be urged that under the English Rules, the Chancery and Queen's Bench Divisions, each still retain exclusive jurisdiction respectively in equity and common law cases, whereas in Ontario such distinction has been entirely abolished. This, however, it is submitted, does not make the same remedies applicable for the enforcement of all judgments of our High Court, irrespective of the nature of such judgments, but leaves the remedies which were applied by the former Court of Chancery still applicable only to cases which were formerly within the exclusive jurisdiction of that Court.

Section 128 of the Ontario Judicature Act provides that the previously existing procedure of any of the Courts whose jurisdiction became vested in the High Court, may continue to be used in the High Court, where it is not inconsistent with the Act or Rules of Court. Osler, J., in *London & Canadian v. Merritt*, above referred to, states, at page 380, in applying

this section, that “ process of sequestration, as judicial process in pursuance of a judgment or decree for the payment of money, and to enforce the performance of it, at one time peculiarly the execution and life of a Court of Equity, is now one of the modes in which, in a proper case, execution may be enforced in any of the Divisions of the High Court.” But he adds, at page 382:—“Now, the judgment on which the Writ of Sequestration here in question was issued, is an ordinary judgment for a debt. . . . It is not in any sense an order to pay money, and no time is limited for payment of the money recovered thereon. The debtor could never, under the former practice, either at law or in equity, have been attached for contempt for non-payment of such a judgment. It does not come within the plain terms of General Order (Chancery) 291, and therefore in my opinion, it will not support a Writ of Sequestration,” And at page 383 he says:—“I think we should not extend the costly, and, I may be permitted to say, cumbrous process of sequestration beyond the cases to which it is clearly applicable.” Wilson, C.J., confines his decision to narrower grounds, and at page 387, says:—“It seems there must be an order to pay a specific sum, and a day for payment given, and default made, before a sequestration will be granted, unless the decree or judgment direct the particular payment or other act to be done. There was no such order in this case, and the judgment is not specifically a direction to pay the amount of it. Upon that ground, the sequestration was improvidently issued, and must be set aside.”

It was apparently assumed in the later case of *London & Canadian v. Morphy*, that this absence of an order for payment by a fixed day was the only objection to the issue of the Writ of Sequestration, to enforce payment of a common law judgment, and the ingenuity of the plaintiff's solicitors in obtaining such an order from a Judge in Chambers, after judgment, seemed to satisfy Wilson, C.J., in the latter case, that the Writ had been regularly issued. He went the length of stating that “a judgment creditor is entitled to procure an order upon the debtor to pay the judgment claim by a time certain, and upon default of payment to have a Writ of Sequestration.” The same expedient was, however, resorted

to in *Hulbert v. Cathcart*, but unsuccessfully as we have already seen.

There is thus a direct conflict between the decisions of our own and the English Courts, and it is important that the profession should know which practice is to prevail in this Province in future. It cannot be denied that the remedy by sequestration might sometimes be utilized to compel an unwilling debtor to pay a judgment debt, when all the ordinary means had failed. If this remedy is to be available for the enforcement of common law judgments, the practice governing it ought to be put on a clear and intelligible basis, either by legislation or by Rules of Court passed for the purpose, which should dispense with the childish expedient of first issuing a Master's order for the payment of a formal judgment of the Court, and basing the sequestration proceedings on the disobedience of that order.

Since the above was in type, an application has been made to Street, J., in the case of *Delap v. Charlebois*, on behalf of the Sheriff of Toronto, for an order to enforce a Writ of Sequestration issued against the defendant; and judgment has been reserved. The writer understands that some of the questions above referred to, were discussed on the argument of the motion, and it is therefore probable that we will shortly have an authoritative decision thereon.

M. J. GORMAN.

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## HISTORICAL ACCOUNT OF THE COURTS OF JUDICATURE IN NOVA SCOTIA.

*(Continued.)*

It is most important in many ways to know the source of much of our judicial procedure which we thus trace back to the colony of Virginia, at that time under the British crown. The concluding regulation, in fact, provides for the guidance of both the General and County Courts, "That if any difficulty shall arise in explaining any of the above rules and regulations, that recourse be had for explanation to the Laws of Virginia, whence most of them are derived, particularly an Act entitled An Act for Establishing the General Court, p. 251 to p. 260, and an Act entitled An Act Establishing County Courts, p. 332 to p. 338." It is remarkable that in view of the provision respecting the laws of Virginia, so far as I can ascertain, there is no copy of the Laws of Virginia containing these regulations to be found either in our Legislative or Law Library. I venture to suggest that an effort be made to secure one.

It should however be mentioned that in the Legislative Library there is to be found a very old copy of what purports to be the laws of Virginia, dated 1704, bound in one volume with the laws of several other English colonies. Although it contains some of the regulations adopted by the Governor-in-Council it evidently does not give all which are to be found recorded in the Council Books. I, therefore, assume that they had been added to, and amended, and that the Committee of Council made their report from the later laws of Virginia, not now in the library.

We have now before us a concise statement of the establishment of the two Courts of Judicature which took cognizance of all business, civil and criminal, with the method of procedure adopted, and which, with some changes, continued in force up to the arrival of Chief Justice Belcher, 15 Oct., 1754, some years after the founding of the settlement, that

is to say the General Court, and as it was at first styled, the County Court. We know that the Governor and Council formed the General Court, but it is not quite so clear who were first appointed Justices of the County Court, as I do not find any specific appointment in the records in the first instance to this office. I conclude, however, with some degree of certainty, that the jurisdiction was assumed by the gentlemen who were made Justices of the Peace at the meeting of Council, 10th July, 1749. Their names were John Brewse, Robert Ewer, John Collier and John Duport. We find some of these gentlemen subsequently acting in that capacity. Of their personal history I can find nothing recorded except short biographical notes in Aikins' Nova Scotia Archives of John Collier and John Duport. The Hon. John Collier was a retired officer of the army. He came out with the first British settlers in 1749, and was soon after his arrival appointed by Governor Cornwallis a Justice of the Peace for the new settlement. He was also a captain of militia. He was appointed a member of Council 27th January, 1752. He died at Halifax 1769.

John Duport was an attorney. He came out with the settlers in June, 1749, and in July following was appointed a Justice of the Peace. In February, 1752, he was made Judge of the Inferior Court of Common Pleas. He performed the duties of Secretary of the Council for many years. In 1776 he prepared an edition of the laws of the province, which was printed by Richard Fletcher, King's printer in Halifax. Mr. Duport was appointed second assistant Judge of the Supreme Court of St. John's (P. E. Island), and in 1770 was elevated to be Chief Justice of that Island. From incidental references in the correspondence of Lord Cornwallis, I think Brewse was an engineer or surveyor, as he appears to have been engaged in laying out the divisions of the newly founded town. Otis Little, I have already noted, was the King's attorney, or we should speak of him as the Attorney-General for the Province, who I regret to say, was subsequently dismissed for misconduct, and William Nesbitt took his place. On September 29th, 1750, William Nesbitt and Thomas Walker were appointed notaries public.

The next reference to judicial procedure is found in the Council Records, December 20th, 1750, when the Justices memorialized the Governor-in-Council for further regulations to be made in regard to the Courts of Justice and matters relating thereto, and on July 14th, 1751, the Council adopted amended and additional rules and regulations for their guidance. It would be unprofitable to give these in detail, or discuss them at any length. It suffices to say that the Courts even then appear from the records to have had plenty of occupation. Among other crimes and charges which they were called upon to adjudicate were those of selling and cutting coins and pistareens; selling liquor without license; for marrying people without lawful authority; for spreading false news; for violating the Sabbath.

Some of the punishments enumerated somewhat shock our feelings at the present day, although quite in accordance with the laws of England then in force. Several persons were hanged for ordinary thefts. Murderers claimed the benefit of the clergy, and after being branded with a hot iron on the hand were allowed to go free; the pillory for certain offences was then in use; whipping, and that severe, was inflicted for many offences which we regard with a more lenient eye. It is hard to realize that all these modes of punishment were formerly practised in our province.

One case of some peculiarity was the application of Anne Porter for relief in a case where she had an execution in the County and General Courts against one John Hoar, but could not get the fruits of her judgment because he had tendered a house in satisfaction. In another James Parport prays for relief against an award which had been made against him.

I may mention just here, though having no direct relation to my paper, that it appears from the Council records that February 3rd, 1752, the first provision was made for the registration of deeds, the commencement of a system highly beneficial to the province. On May 29, 1752, for some reason unexplained, the title of the County Court was changed, it was afterwards known as the "Inferior Court of Common Pleas," and some of the former Justices were re-appointed. The new appointees were Charles Morris, James Monk, John

Duport, Robert Ewer, Joseph Scott, William Bown, Sebastian Zonberluhler, Joseph Gerrish, John Creighton and Edward Crawley to be Justices of the Inferior Court of Common Pleas for the county of Halifax in this province.

The first record we find after the appointment of this new Court is on March 2nd, 1752, a memorial to the Council asking for further rules and regulations. On March 10th another application respecting amendments of error to be made in copies of writs, and 8th April following forms of *capias*, summons and attachment, and execution were adopted, all showing that even at that early date in our legal history questions of practice were worrying the judicial mind.

It is curious to note here that although the Justices were appointed so far back as February, 1752, as "Justices of the Inferior Court of Common Pleas," it was not until May 29th, 1752, that the Order in Council was passed making the change of name from the County Court for the county of Halifax to the Inferior Court of Common Pleas for the county of Halifax.

This completed Cornwallis' work so far as the constitution of the Courts and procedure were concerned, as he shortly afterwards resigned, and Peregrine Thomas Hopson, on August 3rd, 1752, was sworn in Governor, and a new Council appointed as follows: Charles Lawrence, Benjamin Green, John Salisbury, William Steele, John Collier, and George Fotheringham, who by virtue of their office became of course Judges of the General Court.

By an entry in the Council Records, October 25th, 1752, appears a memorial by one Francis Martin to allow an appeal from the decision of the Inferior Court which had been refused. The Council in the exercise of their authority directed that the appeal should be allowed.

Up to November 13th, 1752, the General Court appear not to have possessed a seal to authenticate process issued, for we find by an Order in Council one is directed to be made.

In this year, July 9, 1752, proceedings were commenced before the Council against Ephriam Cook, who had made most damaging charges against the integrity of the Justices of the Inferior Court. Mr. Cook was apparently of a very



contrary and rebellious disposition, and had before this occasioned much trouble to the authorities. In this instance he was summoned to answer the charges made by the Justices, and from the record it appears his slanders were not well founded, but Mr. Cook was not easily frightened, and in the first instance excused himself from appearing to answer for his contempt. He was, however, forced to submission, and made to apologise for his strictures, but he was removed from the commission as a Justice, which he had held till that time.

But this was not the end of attacks on the Justices of the Court of Common Pleas, for we find, December 29th, 1752, their memorial to Council to take under consideration certain aspersions on their characters and conduct as Judges made by no other than David Lloyd, their clerk, as well as a memorial of the merchants and others complaining of partiality and irregularity in their proceedings. All parties were summoned before the Council and were heard at great length, in fact not terminating until 1st March, 1753, when the Council publicly announced their decision in favour of the Justices. It is difficult at this day to form any just opinion on the truth of these assaults on the conduct of our first Judges. The Council examined them with great earnestness and acquitted them. But, on the other hand, the Justices were influential men, some of them members of the Council, and all more or less connected with that body. The whole proceedings are recorded at length and form quite an interesting episode, but too long to discuss further here.

There is one significant record immediately after, on March 5th, 1753, a new commission was issued, including the same Justices and others who were added to their number.

April 21, 1753, a committee of the Council was appointed to collect and print all the laws and ordinances enacted up to that date, and on September 4th, 1753, further rules of Court were adopted, and the acts of the Court in the past confirmed.

On the 19th November, 1753, further forms of procedure were adopted, which are addressed to the Provost Marshal or

his deputy, and issued either under the title of the "Inferior Court of Common Pleas, or General Court of Judicature holden at Halifax," shewing that the same two Courts continued to have jurisdiction in all matters, as indeed, they did until October 21st, 1754, when Jonathan Belcher, on that day, presented his commission from King George, appointing him Chief Justice of the Province of Nova Scotia, and was sworn in. He had previously taken his seat at the Council Board, October 14th, and on the same day Lawrence was sworn in as Governor of the Province. I may mention here that at this time the senior member of the Inferior Court of Common Pleas was styled the first Justice, and enjoyed no other title. As soon as Chief Justice Belcher assumed the duties of his office, the title of the Court was changed, and was afterwards called the Supreme Court, and the General Court consisting of the Governor and Council ceased to exercise further jurisdiction. This appears from the Record books of the Court now in the archives. I can find no Act or regulation of the Council bringing about this change, nor conferring this jurisdiction upon him, and I, therefore, conclude that his authority was contained in his commission as Chief Justice. It is worthy of note as confirming this view, that in several Acts passed in Council after he arrived, the term "Supreme Court" is first used, showing that some authority recognized by the Council must have been conferred upon him.

Belcher held two commissions as Chief Justice of this Province, the first from George II., 1st July, 1754, the second from George III., 14th April, 1761, the mandamus for which last was signed by William Pitt, the great Lord Chatham. As they are both of importance in considering the judiciary of the Province, I give them in full. I also append the mandamus for several commissions to other Chief Justices and Attorneys and Solicitors-General.

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MANDAMUS FOR CH. J. BELCHER, FIRST COMMISSION FROM  
GEORGE II.

George R.

Trusty and well-beloved we greet you well. Whereas we have taken into our Royal Consideration the Integrity and

Ability of our Trusty and Well-beloved Jonathan Belcher, Esquire; we have thought fit hereby to require and authorize you forthwith to cause Letters Patent to pass under our . . . Seal of that our Province of Nova Scotia or Acadia for constituting and appointing the said Jonathan Belcher, Esquire, our Chief Justice of and in our said Province. To have, hold, execute and enjoy the said office unto him the said Jonathan Belcher, for and during our Pleasure, and his Residence within our said Province, together with all and singular the Rights, Profits and Emoluments unto the said Place belonging in the most full and ample manner, together with full power and authority to hold the Supreme Courts of Judicature at such Places and Times as the same may and ought to be held within our said Province. And for so doing this shall be your warrant; and so we bid you farewell.

Given at our Court at Kensington this First day of July, 1754, in the twenty-eighth year of our Reign.

By His Majesty's command,

(Sgd.) T. ROBINSON.

MANDAMUS FOR CH. J. BELCHER, SECOND COMMISSION FROM  
GEORGE III.

George R.

Trusty and Well-beloved We greet you well. Whereas we have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Well-beloved Jonathan Belcher, Esquire, We have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under Our Seal of Our Province of Nova Scotia in America, for constituting and appointing him, the said Jonathan Belcher, Our Chief Justice of and in Our Province of Nova Scotia; To have, hold, exercise and enjoy the said Office unto him, the said Jonathan Belcher, for and during our pleasure, and his Residence within our said Province, together with all and singular the Rights, Profits, Privileges and Emoluments unto the said Place belonging, in as full and ample manner as he the said Jonathan Belcher, or any other person have heretofore held and enjoyed, or of right

ought to have held and enjoyed the same, with full Power and Authority to hold the Supreme Courts of Judicature at such Places and Times as the same may and ought to be held within our said Province, and you are to cause to be inserted in the said Letters Patent a Clause for revoking and determining the last Letters Patent whereby the said Jonathan Belcher was constituted Chief Justice of Our said Province of Nova Scotia. And for so doing this shall be your warrant and so we bid you farewell. Given at Our Court at St. James's, the Fourteenth day of April, 1761, in the first year of Our Reign.

By His Majesty's command,

(Sgd.) W. PITT.

This is a convenient place to draw attention to the fact that the commissions to our early Judges were, as in the case of Chief Justice Belcher, "during pleasure only," that is to say, during the pleasure of the Crown, by whose authority alone they were removable. This condition of affairs was changed in 1849, when a bill was brought into the House of Assembly by which the Judges were to be appointed "during good conduct," "*quamdiu se bene gesserit*" in legal phraseology, and only removable on the joint address of the two Houses of the Legislature. The reason assigned for this change was to make the Judges quite independent of all influences, whether of the Crown, or from any other source. Strange to say this change was bitterly opposed by so eminent a lawyer and Judge as the late Mr. Justice Johnston, but I rather suspect his opposition was due to another result of the law which henceforth left judicial appointments in the hands of the Provincial Government without reference to the Imperial authorities. This I gather from expressions used in the course of the debate on the subject. My impression is confirmed by the fact that the late Mr. Justice Dodd appears to have been the last Judge of the Supreme Court who was appointed in consequence of a mandamus from the home authorities. He was appointed 17th March, 1849, against the wish of the Provincial Government, composed of Howe, Young and others. The previous Government, of which Judge Dodd was a member, had resigned the February before,

and had evidently recommended Dodd for the vacant Judgeship. Now, although the Act first referred to passed at this session, it is not incorporated in the Acts for the year 1849, and I conclude that the Home Government had not at that time assented to it. This is proved by the fact that the late Mr. Justice DesBarres' commission, dated November 14th, 1849, was in exactly the same terms as those of the former Judges, although he was appointed by the Provincial Government.

Another noticeable change was made, that is to say up to the reign of George III. the Judges, both in England and her colonies, on the death of the reigning sovereign required new commissions. This is the reason why Chief Justice Belcher held two commissions. An Act was passed early in the reign of George III., which declared that the office of a Judge should not be vacated on the demise of the sovereign, and, I presume, applied to colonial appointments, thus placing the Judges in a perfectly independent position, the same as occupied at the present day, when they are irremovable except by a vote of the two Houses of Parliament.

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#### MANDAMUS FOR JOHN FENTON'S COMMISSION AS PROVOST MARSHALL.

George R.

Trusty and Well-beloved, We greet you well. Whereas We have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Well-beloved John Fenton, Esquire, We have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under the Seal of Our Province of Nova Scotia, constituting and appointing him the said John Fenton, Provost Marshall of and in Our said Province; To have, hold, exercise and enjoy the said Office or Place unto him the said John Fenton, by himself or his sufficient Deputy or Deputies (for whom he shall be answerable) for and during Our pleasure, and his Residence within our said Province, together with all and singular the Rights, Salaries, Allowances, Fees, Profits, Privileges and Emoluments thereunto belonging or appertaining, in as full and ample manner as any

other Person hath heretofore held and enjoyed, or of Right ought to have held and enjoyed the same. And for so doing this shall be your Warrant. And so we bid you farewell. Given at our Court at St. James's the Seventeenth day of March, 1772, in the Twelfth Year of Our Reign.

By His Majesty's command,

(Sgd.) HILLSBOROUGH.

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MANDAMUS FOR JAMES MONK'S COMMISSION AS SOLICITOR-GENERAL.

George R.

Trusty and Well-beloved, We greet you well. Whereas We have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Well-beloved James Monk, Esquire, We have thought fit hereby, to authorize and require you forthwith to cause Letters Patent to be passed under the Seal of Our Province of Nova Scotia, constituting and appointing him the said James Monk, Our Solicitor-General of and in Our said Province; To have, hold, exercise and enjoy the said office unto him the said James Monk, during Our Pleasure, together with all and singular the Rights, Fees, Profits, Privileges and Advantages thereunto belonging, or appertaining, in as full and ample manner as any Solicitor-General of Our said Province hath heretofore held and enjoyed, or of Right ought to have held and enjoyed the same. And you are to cause to be inserted in the said Letters Patent a Clause or Proviso obliging the said James Monk to actual Residence within our said Province, and to execute the said Office in his own Person, except in case of sickness or incapacity, and with all such other clauses and Provisos as are requisite and necessary in this Behalf. And for so doing this shall be your Warrant. And so we bid you farewell. Given at our Court at St. James's the thirty-first day of July, 1772, in the Twelfth Year of our Reign.

By His Majesty's command,

(Sgd.) HILLSBOROUGH.

MANDAMUS FOR RICHARD JOHN UNIACKE'S COMMISSION AS  
SOLICITOR-GENERAL.

George R.

Trusty and Wellbeloved, We greet you well. Whereas We have taken into Our Royal Consideration the Loyalty, Integrity and Ability of Our Trusty and Wellbeloved Richard John Uniacke, Esquire, We have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under the Seal of our Province of Nova Scotia, constituting and appointing him the said Richard John Uniacke Our Solicitor-General of and in Our said Province in the room of Richard Gibbons, Esquire, whom we have appointed our Attorney-General of Our said Province; To have, hold, exercise and enjoy the said Office unto him the said Richard John Uniacke during Our Pleasure, together with all and singular the Rights, Fees, Profits, Privileges and Advantages thereunto belonging or appertaining in as full and ample manner as any Solicitor-General of Our said Province hath hereto held and enjoyed, or of Right ought to have held and enjoyed the same. And you are to cause to be inserted in the said Letters Patent a clause or proviso obliging the said Richard John Uniacke to actual residence within our said Province, and to execute the said office in his own Person, except in case of sickness or incapacity, and with all such other clauses and provisos as are requisite and necessary in this behalf. And for so doing this shall be you Warrant. And so we bid you farewell. Given at our Court at St. James's the Twenty-eighth day of February, 1782, in the Twenty-second year of Our Reign.

By His Majesty's Command.

(Sgd.) W. ELLIS.

MANDAMUS FOR WILLIAM THOMSON'S COMMISSION AS  
PROTHONOTARY.

George R.

Right Trusty and Wellbeloved, We greet you well. Whereas we have taken into Our Royal Consideration the

Loyalty, Integrity and Ability of Our Trusty and Well-beloved William Thomson, Esqr. We have thought fit hereby to authorize and require you forthwith to cause Letters Patent to be passed under Our Seal of that Our Province of Nova Scotia, constituting and appointing him the said William Thomson, Prothonotary and Clerk of the Crown in our said Province, to have, hold, exercise and enjoy the said office during our Pleasure and his Residence within Our said Province with all and singular the Rights, Salaries, Fees, Profits, Privileges and Emoluments thereunto belonging or appertaining, and for so doing this shall be your Warrant. And so we bid you farewell. Given at Our Court at St. James's the Sixth day of October, 1786, in the Twenty-sixth year of Our Reign.

By His Majesty's Command.

(Sgd.) SYDNEY.

*(To be Concluded.)*

CHARLES J. TOWNSEND.

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## EDITORIAL REVIEW.

**Appeals from the Divisional Courts.**

We call attention to a case of *Farquharson v. Imperial Oil Company*, at page 125 of the current Occasional notes, which puts an entirely new face on the subject of appeals to the Supreme Court from Divisional Courts. In that case an application was made to Mr. Justice Gwynne for leave to appeal from a Divisional Court, in a case in which no appeal would lie to the Court of Appeal in Ontario. His Lordship granted the leave, if necessary, and on an appeal from that decision to the Supreme Court, it was held that no appeal would lie to the full Court from the order of a Judge granting leave to appeal. It is presumed, however, that a motion would be entertained to quash an order made by a Judge of the Court without jurisdiction; or the Court would certainly refuse to hear an appeal, if there were no jurisdiction to hear it, although an order might have been made by a Judge of the Court allowing it to be brought on for hearing. In the absence of a full report of the argument and judgment, it is impossible to discuss the matter thoroughly, but it is probably fair to assume that these matters were not overlooked by either the Counsel or the Court, and that the Supreme Court will now entertain an appeal from a Divisional Court in cases where there is no appeal to the Court of Appeal.

We discussed the matter at length in Vol. xvi at p. 277, citing a previous decision of the Supreme Court which seemed to us to settle a contrary practice. We took the case, *Ste. Cunegonde v. Gougeon*, 25 S. C. R. 78, as interpreting "highest Court of final resort in the Province" to be the highest actual Court, not the highest Court to which the particular case could go. The result we expressed as follows:—"It appears, therefore, that though we have a

final Court of appeal in Canada, beyond the jurisdiction of the Provincial Legislature, they may yet, by keeping on foot a final Court of Appeal in the Province and refusing the privilege of appealing to it, in the result, remove from the Supreme Court a large portion of the work which it was intended it should do." There is no doubt of the correctness of this conclusion if the case cited has been correctly interpreted, and the language does certainly seem plain enough.

What then are we to infer from the present case? If *Ste. Cunegonde v. Gougeon* is right, Mr. Justice Gwynne's order would be without jurisdiction, for no leave could be granted where there was no appeal from such a Court. Has the Court determined that the Quebec Case was ill-considered, and that this means of getting over it should be adopted? If so, it would have cleared matters up a good deal to have so decided. If not, still it is quite satisfactory to know that an entrance to the Court can be effected by applying to Judge for leave in the first instance. It certainly is an extraordinary thing that the original scheme of a Common Appellate Court for all the Provinces should be susceptible of defeat by the simple process of cutting off intermediate appeals, and refusing to allow cases to go in appeal to the only Court in the Province from which an appeal would lie to the Supreme Court. It is to be hoped that the full judgment of the Supreme Court in the case noted will clear up the matter.

#### **Restraint on Alienation; Forfeiture.**

The question of restraint on alienation was fully discussed in Vol. xvii at page 105 and the following pages, and all the cases in our Courts bearing upon the subject are there set out and commented upon.

The short history of these restraints is written when it is said that in *Earls v. McAlpine*, 6 App. R. 145, our Court of Appeal followed the decision of Sir George Jessel in *Re Macleay* L. R. 20 Eq. 186, in which it was held that a partial restraint on alienation was good; and that since

the decision in *Re Rosher*, 26 Ch. Div. 801, the doctrine of restraint on alienation has undergone a complete revulsion of opinion. The reasoning of that case is conclusive that a private individual cannot impose a restraint upon his grantee or devisee as to the mode of enjoyment of the property conveyed.

Our Courts, however, being bound to follow the decision of the Court of Appeal have necessarily adhered to the principle that a partial restraint is good; the result being that every shift and device is resorted to, in order to hold that words restraining alienation are complete, and not partial words of restraint, so as to free the property from any legal restriction. A more unsatisfactory state of affairs could not well be conceived of. We refer again to the subject, however, for the purpose of showing what the crowning absurdity of such a restraint is in its effect upon the ownership of the property.

In *Earls v. McAlpine*, a breach of the restraint was held to occasion forfeiture. A repetition of this occurs in a case of *Re Bell* in the current number of *Occasional Notes*, page 142, where there was a devise to three sons in equal shares, under the restriction that they should be without power to charge or alien the same or any part thereof except by will. The restriction was held to be valid because partial only. A mortgage in fee had been made, which was against the restraint, and it was held that it occasioned a forfeiture of the devise. There was no devise over, no person to take on breach of the so-called condition, no person to take advantage of the breach of trust, if it might be so denominated; there was no person to take advantage of the forfeiture so-called. The breach of the condition, in its terms, imposed absolutely no hardship or disastrous consequences upon the person who held under the restriction. On the contrary the devise having completely failed or become forfeited on the ground of the breach of the condition, the three sons took the land by law as heirs at law of the testator absolutely freed from any condition. A more absurd result could not well be imagined. In no

instance, perhaps, can it be found that a forfeiture is a benefit to the person committing the prohibited act. The breach of the condition itself by this decision gives a good title, and if any result were desired to show how foundationless the theory of restraint is, this one furnishes an example. It would be much better if some Court would determine, once and for all, that restraints imposed by private individuals were invalid, and would base the decision upon the ground that *Earls v. McAlpine*, having been decided in accordance with what is now conceived to be the erroneous decision of an English Judge, is therefore no longer binding.

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## BOOK REVIEWS.

*A Practical Treatise on the foreclosure of Mortgages of Realty*, with the rules of practice relating to Foreclosure, annotated, and an Appendix of Forms, and the Mortgage Laws of Ontario (being a collection of statutes and sections of statutes relating to mortgages of realty). By A. T. HUNTER, LL.B., of Osgoode Hall, Barrister-at-Law, Author of "Power of Sale under Mortgages of Realty," and "Real Property Statutes of Ontario;" Toronto: The Carswell Co., Limited. 1899.

Mr. Hunter is already most favourably known to the Profession through his works on Powers of Sale and Real Property Statutes, both of which works are excellent treatises. The present work is a fitting complement to the others and will be appreciated by the Profession. There is no other work which deals with the subject of Foreclosure as a unit, and if the book possessed no merits of its own it would be welcome on that account alone. We can, however, cheerfully compliment the learned author on producing a book which comprehensively deals with the subject. Both the law and practice are fully treated of and we do not hesitate to say that it should be in every office.

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*A Treatise on the Law of the Contract of Pledge*, as governed by both the Common Law and the Civil Law. By HENRY DENIS, of the New Orleans Bar, Professor of Civil Law at the Tulane University of Louisiana. New Orleans: J. F. Hansell & Bro., Limited. 1898.

This work is constructed upon an unusual but not original plan. It is most effective in illustration. The design, very well executed, is to compare the two systems of law upon the contract of pledges, a subject common to all nations—in fact, as the learned author puts it, the life of commerce. The leading writers on the Civil Law and those on the Common Law are referred to frequently, as well as leading cases on the subject.

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# THE CANADIAN LAW TIMES.

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MAY, 1899.

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## A PLEA FOR A UNIFORM CONTRACT OF FIRE INSURANCE FOR CANADA.

PROBABLY in no development of commercial activity has a more marked development taken place in Canada during recent years, than in that of fire insurance. Parliamentary papers show us that the fire risks carried by companies licensed under legislation of the Parliament of Canada have increased from about \$407,000,000 in 1879 to over \$842,000,000 in 1896. This, however, by no means represents the totality of risks carried. Ontario alone, in addition to its share of this sum, has risks to the amount of over \$217,000,000 carried by companies licensed by the Legislature of that province, and shows an increase of \$124,000,000 during the same period. I have not the insurance returns of the other provinces, nor is it possible to estimate the amount of insurance in Canada carried by unlicensed American companies. The volume is known to be very large, but the above figures are of sufficient magnitude to indicate the important place fire insurance occupies in the financial affairs of the people of this country. This steady growth in the volume of business has been accompanied by new departures in the methods of transacting fire insurance business, and by a greater complexity in the nature and character of the risks undertaken, while more intricate problems of insurance are presented to companies for consideration than were dreamed of twenty years ago.

This being so, we need not be surprised to find in a progressive country like the United States, where popular ideas

are more quickly impressed upon the Legislature of the country than perhaps elsewhere, a very marked progress in insurance legislation. The fact was appreciated that the department of fire insurance, by the rapid development of trade and commerce, had been subjected to a process of evolution that demanded new remedies to meet the new conditions. The first move was in 1886, by the Legislature of the State of New York, which, by cap. 488, sec. 1, provided as follows:

“The superintendent of the Insurance Department shall prepare and file in the office of the Secretary of State, on or before the 15th day of November, 1886, a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon or added thereto, and form part of such contract or policy, unless the New York Board of Fire Underwriters shall prepare, approve and adopt a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements and conditions as may be endorsed thereon or added thereto, and form a part of such contract or policy, and file the same in the office of the Secretary of State on or before the 15th day of October, 1886, and such form when filed shall be known and designated as the Standard Fire Insurance Policy of the State of New York.”

By the second paragraph it was provided that after the first of May, 1887, no form of contract should be used other than the Standard form.

It is of the utmost importance for the purpose of a proper criticism of the statutory conditions in force in the Province of Ontario to compare the causes which led to the insurance legislation in New York State and the Province of Ontario respectively, because it is here we find the explanation of the differences which exist between the policies of insurance in use in the two countries.

In conformity with the above legislation, the superintendent of insurance of the State applied to the New York Board of Fire Underwriters to prepare a standard policy, and subsequently the Committee of Laws and Legislature of the Board, of which Elijah R. Kennedy, Esquire, was chairman, undertook this responsible labour, and he has favoured me



with a statement of the circumstances under which the New York standard policy was prepared. He says:

“In many loss adjustments the diverse incongruous, conflicting, printed conditions of numerous policies caused great annoyance to the owners of property and to parties acting for them in adjustments.

“The bill was introduced from sources hostile to the companies, owing to quarrels arising out of a couple of important adjustments. . . .

“After much discussion, the bill was slightly modified to allow some flexibility, and the New York Board of Fire Underwriters was substituted as the body charged with the duty of preparing the policy. We went about it in a most painstaking and conscientious way. Blanks with topics printed in the upper left-hand corner were prepared and sent to insurance men all over the United States for remarks on these topics, and for proposed conditions. I compiled and summarized the replies after they came back, and submitted them to the committee. . . .

“The preparation of the policy took us quite six months. Together with the policy we prepared a considerable number of forms for riders to accommodate practical needs as we understood them. I should say too, that some of the leading merchants of the city were consulted as to conditions; and I may give you my unqualified assurance that in no condition was the policy regarded as less liberal towards the insured than the policies which had been current, and in several respects conditions more liberal than any company had ever offered were incorporated. Mr. Butler (Counsel for the Board) has since good humouredly remarked that it was the worst summer's work he ever did, as the standard policy had pretty nearly abolished litigation. . . .

“The liberality of the terms of this policy is something in its favour, and the cessation of the annoyances arising from diverse and conflicting policies has proven of immense convenience and value to our people.”

It is quite clear from the foregoing letter that the New York standard policy was adopted to obviate the difficulty in adjusting losses by reason of the lack of uniformity in the policies, and not any unfairness or hardship in the conditions

imposed upon the insured. To illustrate this difficulty of adjusting losses, a very simple example will suffice, and I may cite the following case from an article advocating uniform conditions in the *Post Magazine and Insurance Monitor*, an English journal of high standing, of the present year:

“There is an explosion of gas—not coal gas—on premises not forming part of any gas works. Office A. is interested for £200, and B. for the same sum. The damage, we will assume is £200. A.’s conditions cover only explosions of coal gas; B.’s cover explosion of gas. What is the result? Unless B.’s policy has a special specified clause in it, he bears the whole £200 loss and A. loses nothing.

“Again, let us look at the arbitration condition in this light. A loss occurs, and the fulfilment of one of the conditions is in dispute. A.’s policy allows arbitration on the point, whilst B., C. and D.’s do not. A. has the lead. Imagine the difficulties there will be in settlement.

“Finally, offices A., B. and C. with the insured X., go to arbitration. A. and B. leave the costs in the hands of the umpire, while C. only agrees to pay a moiety. X., we will assume, is not worth 1s. in the pound. Knowing this, might not specially heavy costs be given against the offices, so that A. and B., practically speaking, have to pay a share of the costs which C. compels X. to be liable for?”

Now, turning to the Province of Ontario, we find that the Courts in a number of instances previous to the year 1874 had called the attention of the Legislature to the great hardship to which the insured was subjected by the unconscionable nature of the conditions attached to the contract of insurance. In the judgment of the Court in the case of *Smith v. Commercial Union Ins. Co. (a)*, after pointing out the complexity and far-reaching nature of some of the conditions, Chief Justice Wilson says :

“This is a degree of inquisitorial power under the penalty of a forfeiture of the insurance money, which it is vexatious and difficult to comply with, and which is about equal to the forfeiture of itself, and almost a perfect immunity to the insurers against their ever paying the money. . . .

(a) 33 U. C. R. at p. 90.

“The conduct of companies when enforcing rigidly such conditions, has often been complained of by the Courts—by reason of the number and nature, and difficulty of the conditions they introduce into their policies; and the time perhaps had come when the Legislature should interfere, to stand between them and those they insure or pretend to insure, or, in other words, the public, by limiting them to such conditions which the Courts shall determine to be reasonable.

“Companies are often imposed upon by wilful fires, and by very fraudulent conduct on the part of the assured. . . .

“At present it is a mere system of attack and defence. The more fraudulent or felonious the attack, the more numerous, complicated and guarded the defences are. But that is a war calculated only for two very special classes of persons. The honest people are lost sight of, and suffer in the conflict.”

Adopting the suggestion of the Courts, the Legislature of Ontario, by 38 Vict. cap. 65, adopted the following legislation :

“A commission is to be issued by the Lieutenant-Governor addressed to three or more persons holding judicial office in this Province, for the purpose of determining what conditions of fire insurance policy are just and reasonable conditions.”

And to carry out this legislation, the following Judges were subsequently appointed: The Hon. William Buell Richards, afterwards Chief Justice of the Supreme Court; the Hon. John Godfrey Spragge, afterwards Chief Justice of the Court of Appeal; the Hon. John Hawkins Hagarty, afterwards Chief Justice of the Court of Appeal; the Hon. Samuel Henry Strong, present Chief Justice of the Supreme Court, and the Hon. Christopher Salmon Patterson, subsequently Puisne Judge of the Supreme Court. The Commissioners brought in their recommendations, which are contained in the Act of the following year as 39 Vict. cap. 24. This Act, with some few amendments, contains the statutory conditions now in force in the Province of Ontario.

The original report of the Commissioners has been lost, although a careful search in the provincial archives has been made for it. We are not, however, left entirely in the dark as to its contents, as a copy seems to have been before Chief

Justice Armour when preparing his judgment in *Parsons v. The Queen Ins. Co. (b)*, where, in discussing the statutory conditions he says: "The commissioners appended to their report the conditions settled and approved of by them, and stated in their report that these conditions had been settled after consideration of the policies of all the companies doing business in the Province; that suggestions had also been received from several prominent merchants, and the policy suggested by a committee of the Dominion Board of Trade had also been made use of; that the Board of Fire Underwriters of Toronto were furnished with a draft of the proposed conditions, and their suggestions and criticisms were received by the commissioners, and when practicable admitted, and the commissioners stated that it was to be hoped, therefore, that these conditions as settled embodied what was reasonable in the views of the two great classes interested, insurers and insured."

The eminence of the members of the Royal Commission is a sufficient guarantee of the value of its report, but the provision that variations might be introduced, indicates that the commissioners did not think every reasonable condition had been exhausted. It is apparent that the usefulness of a standard form is impaired by permitting any variation or addition to be made, and the aim of legislation in the United States has been to give a set of conditions so full and complete that variations might be absolutely dispensed with.

Giving the fullest credit to the Legislature and the commissioners for the work done in preparing the statutory conditions, the fact remains that the main object in the mind of both was the preparation of conditions which would do away with the hardship the insured was subjected to where the conditions were framed solely in the interests of the insurer. The first section of the Act 39 Vict. cap. 24, indicates this by the words,

"The conditions set forth in the Schedule to this Act shall, *as against the insurer*, be deemed to be part of every policy."

Above and beyond this is the fact that nearly twenty-five years have elapsed since these conditions were framed. In

their practical application various deficiencies were found ; some of these have been corrected by later legislation, but others still remain, and a time has come when the conditions so valuable in their day should be revised and made to conform to modern commercial requirements, and at the same time made applicable to the whole of Canada.

It must be remembered that every contract of insurance which is so framed that the company is not fairly and properly protected from dishonest people, inevitably results in the loss being borne by the insured who are honest. If companies are compelled to pay unjust claims so as to avoid litigation, the means is always in their hands to recoup themselves by increasing their rates of insurance, and no legislation can possibly prevent them from so doing. During recent years in the Province of Ontario, a vigorous effort has been made to obtain certain amendments to the statutory conditions, but so far without avail. The movement has not been one coming from the insurance companies, who are in the business for profit, but from the purely mutual companies, who have a practical monopoly of the non-commercial or non-mercantile hazards outside of cities and towns throughout that province. No feature of fire insurance is more interesting than the growth of what have been called the Farmers' Mutuals in the Province of Ontario. These are local institutions officered by the leading farmers from almost every county in the Province. The companies are seventy-two in number, and along with a few other mutual companies that undertake mercantile business, as well as farm risks, they carry over \$200,000,000 of risks in this Province, and represent 100,000 policy holders. These mutual companies have organized an association called The Mutual Fire Underwriters Association of Ontario, which assembles annually in the city of Toronto for the transaction of business affecting the general welfare. For three years a strong deputation for the association has interviewed the Provincial Government, urging amendment to the statutory conditions, and it is evident that in asking such legislation the Mutual Companies speak quite as strongly for the insured as the insurers, and this affords very cogent proof that the Ontario statutory conditions are not wholly satisfactory, but require revision and amendment.

So valuable was the legislation adopted in 1886 by the Legislature of the State of New York deemed in the interest of the public, that other States proceeded at once along the same line, and within eight years Pennsylvania, Michigan, New Jersey, North Carolina, North Dakota, South Dakota and Rhode Island adopted the New York standard form, while Maine, Minnesota, New Hampshire, Wisconsin and Iowa introduced uniform policies, but in some respects differing from the New York standard form.

It would extend this article far beyond its proper limits to set out in detail the conditions of the New York standard policy, which forms so marked an advance upon the policy in force in the Province of Ontario.

If a uniform policy framed upon fair principles in the interest of both insurer and insured is desirable in any one province, every reason which has been adduced by the Courts in support of such legislation is equally applicable to a uniform policy for the other provinces of Canada in which no statutory conditions are in force, and this applies to all the Provinces and territories except Ontario, Manitoba and British Columbia. In addition to this, the benefit to companies doing business all over Canada of having uniform and consistent legislation enforceable in every province, can scarcely be over estimated.

It remains, therefore, to be determined whether the Parliament of Canada has jurisdiction to legislate on the subject of uniform conditions of fire insurance contracts.

This necessitates a careful consideration of the decisions of the Privy Council since the passing of the B. N. A. Act. At first blush one might be inclined to think that the decision in the *Citizens Ins. Co. v. Parsons* (c), was opposed to the contention that any such power exists, but a careful consideration of the case itself and the subsequent decisions of the Privy Council, where this case has been further considered, do not support that view, but on the contrary will, I venture to think, clearly establish the jurisdiction of the Parliament of Canada to deal with this subject. In the *Citizens Ins. Co. v. Parsons*, the question for the Court to determine was the right of the Legislature of Ontario to adopt

(c) 7 App. Cas. 96.

the Act to secure uniform conditions in policies of fire insurance, 39 Vict. cap. 24.

It was contended on behalf of the Federal power that the jurisdiction could be claimed under the 2nd sub-sec. of sec. 91, namely, legislative authority over the regulation of trade and commerce, and secondly, under the general powers conferred by sec. 91 "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects which this Act assigned exclusively to the Legislatures of the Provinces."

Lord Watson, in the case of Attorney-General for Ontario v. Attorney-General for the Dominion (*d*), says that power to legislate under the authority of the general powers conferred by sec. 91 will not extend to any of the sub-sections of sec. 92. He makes use of the following language:

"But to those matters which are not specified among the enumerated subjects of legislation, the exception from sec. 92, which is enacted by the concluding words of sec. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by sec. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in sec. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in sec. 92."

In the case of *Citizens v. Parsons* it was finally held that legislation with respect to uniform conditions does fall within the powers of the provincial legislatures by virtue of sub-sec. 13 of sec. 92, wherein powers to legislate exclusively are given to the Provinces in matters relating to property and civil rights in the province.

If therefore, the only powers to legislate with respect to uniform conditions are to be found in the general power to legislate in all matters affecting the peace, order and good

(*d*) L. R. (1896) A. C. at p. 348.



government of Canada, it would appear that by the conjoint effect of these two decisions, the Parliament of Canada would have no power to legislate upon this subject.

We have next to consider whether such legislation falls under the 2nd sub-sec. of sec. 91, namely, the regulation of trade and commerce, because if it does, it is equally clear from the decision of the Privy Council in the case above mentioned, that, although the power to legislate with respect to this subject may be vested in the local legislature under its authority with respect to property and civil rights in the province, yet once the Parliament of Canada under its powers to regulate trade and commerce has exercised its authority, by enacting legislation dealing with this subject, such legislation necessarily overrides the provincial legislation. Lord Watson put it this way in the above case:

“It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation.”

This general statement that the legislation of the Parliament of Canada must override provincial legislation when they come in conflict, is abundantly established by the decisions both of the Supreme Court and the Privy Council.

In the case of *The Citizens Ins. Co. v. Parsons* in the Supreme Court (*e*), Taschereau and Gwynne, JJ., who dissented, held the Parliament of Canada had and the Provincial legislatures had not power to enact laws regulating contracts of fire insurance.

The judgments of the majority of the Court, although they arrived at the same result in favour of the legislative jurisdiction of the Province, were not on some points entirely in harmony. It is, however, important to note that Chief Justice Ritchie and Mr. Justice Fournier agreed in holding that the legislation was *intra vires* because the Dominion Parliament, although having power to legislate on the same subject under sub-sec. 2 of sec. 91, yet not having so legislated, and the subject matter being also one affecting

(*e*) 14 S. C. R. 215.



property and civil rights, and therefore within the jurisdiction of the Provincial legislature, the legislation was not *ultra vires*.

Chief Justice Ritchie makes use of the following words: p. 242.

"No one can dispute the general power of parliament to legislate as to 'trade and commerce,' and that where, over matters with which local legislatures have power to deal, local legislation conflicts with an Act passed by the Dominion Parliament in the exercise of any of the general powers confided to it, the legislation of the local must yield to the supremacy of the Dominion Parliament; in other words, that the provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion Parliament may prescribe."

Again he says, p. 243:

"I do not think the local legislatures are to be deprived of all power to deal with property and civil rights, because parliament, in the plenary exercise of its powers to regulate trade and commerce, may possibly pass laws inconsistent with the exercise by the local legislatures of their powers—the exercise of the powers of the local legislatures being in such a case subject to such regulations as the Dominion may lawfully prescribe."

Similarly, Mr. Justice Fournier says, p. 258.

"In order to reconcile the exercise of these powers" (relating to trade and commerce on the one hand, and property and civil rights on the other), "I have arrived at the conclusion, in a case such as the one now under consideration, that the provincial jurisdiction is only limited by the exercise by the Federal Parliament of its power, in so far as the latter is competent to exercise it, and that the province can still exercise its power over that portion of the subject matter over which it has jurisdiction whenever this would not directly conflict with Federal legislation in a matter within Federal jurisdiction."

In the same case when in the Privy Council, Sir Montague Smith says (*f*):

“Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce when competently exercised by the Dominion Parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this Board in the cases of *L'Union St. Jacques de Montréal v. Belisle*; *Cushing v. Dupuy*.”

In *Russell v. The Queen* (*g*), a case in which the validity of the Canadian Temperance Act, 1878, was in question, Sir Montague Smith, delivering the judgment of the Privy Council, says:

“The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of secs. 91 and 92, and their relation to each other, were fully considered and commented on by this Board in the case of the *Citizens Insurance Company v. Parsons*. According to the principle of construction there pointed out, the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in sec. 92, and assigned exclusively to the Legislatures of the Provinces. If it does, then the further question would arise, viz.: whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sec. 91, and so does not still belong to the Dominion Parliament.”

In *Hodge v. The Queen* (*h*), the Privy Council in considering the subject matter and legislative character of secs. 4 and 5 of the Liquor License Act, 1877, held that these were merely police or municipal regulations of a local character, and “as such they cannot be said to interfere with the general regulation of trade and commerce which belongs to

(*f*) 7 App. Cas. 113.

(*g*) 7 App. Cas. 829.

*h* 9 App. Cas. 117.

the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted."

Again, in *Tennant v. Union Bank of Canada* (i), Lord Watson in delivering the judgment of the Privy Council says:

"The objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shown that by the Act of 1867 the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sec. 92. But sec. 91 expressly declares that 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority."

And again:

"But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada. These depend upon sec. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the Province."

Again, in the case of the *Attorney-General for Ontario v. Attorney-General for Dominion* (j), in which the question arose as to the validity of R. S. O. (1887), cap. 124, sec. 9, affecting preferences to execution creditors, Lord Chancellor Herschel says:

"Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the

(i) L. R. (1894) A. C. 81.

(j) L. R. (1894) A. C. 189.

Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy legislation of the Dominion Parliament in existence."

These citations abundantly establish the proposition that if legislation with respect to uniform conditions of fire insurance contracts falls within the authority conferred upon the Dominion Parliament to pass laws for the regulation of trade and commerce, then upon such legislation being adopted it will supersede legislation on the same matter which has previously been adopted by the local legislature with full authority under its jurisdiction to legislate in matters affecting property and civil rights.

We have, therefore, only to consider now, what authority there may be for the contention that the regulations and conditions affecting contracts of insurance fall within the category of subjects relating to the regulation of trade and commerce exclusively assigned to the Federal Parliament. This matter was much considered in the *Citizens Ins. Co. v. Parsons* case, above cited, and the opinions of the Judges both of the Supreme Court and the Judicial Committee of the Privy Council in that case have an important bearing upon the question. Chief Justice Ritchie, after discussing at length the proposition as to whether or not an insurance company is a trading company, determines the liabilities of the parties without disposing of this point. He says:

"But in the view I take of this case, I am willing to assume that insurance companies may be considered trading companies, and yet, that it by no means follows that the legislation complained of is beyond the powers of the local legislatures."

The present Chief Justice delivered no formal judgment, but simply authorised the Chief Justice to state that he entirely agreed with the majority of the Court. Mr. Justice Fournier held that although insurance was a commercial transaction, yet the contract of insurance (which was the matter in question in the action), formed part of the civil law and therefore fell within the jurisdiction of the provinces, as coming under the head of "civil rights."

Mr. Justice Taschereau, after investigating the laws of other countries, including Quebec, Prussia, Belgium, Portugal, Spain, Holland and Wurtemberg, came to the conclusion that the contract of insurance against fire was a commercial contract, and that "not a single authority had been cited at the Bar tending to show that there they are not considered as commercial companies, or that their operations are not considered as commercial operations."

Again he says:

"If the Federal Parliament has power to create insurance companies, it has the power to regulate them, that is to say, to prescribe the rules under which they can carry on their trade, by which their trade is to be governed."

Mr. Justice Gwynne on this point was in full accord with Mr. Justice Taschereau. He says:

"Contracts of fire insurance are governed by the same general principles as marine policies, and the solution of any question that may arise upon an insurance against fire will be found by a careful application of the doctrine of marine insurance; and the law most reasonably presumed originally that persons who entered into contracts respecting fire insurance were acquainted with, and had in their contemplation, the custom of merchants and legal rules affecting marine insurance, and intended that those new contracts should be construed and controlled by the same means. No reason therefore exists for regarding the business of marine insurance to be a trade and a branch of commerce, and that of fire insurance not to be."

It is true that the judgments of Mr. Justice Taschereau and Mr. Justice Gwynne are dissenting judgments of the Supreme Court, but they are entitled to as much weight as the opinions of the majority of the Court, because the judgment of the Privy Council expressly refused to determine the case on this ground. Sir Montague Smith in delivering the judgment of the Court, says:

"A question was raised which led to much discussion in the Courts below and this bar, viz.: whether the business of insuring buildings against fire was a trade. . . Whether the business of fire insurance properly falls within the description of a 'trade' must, in their Lordships' view, depend

upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decisions on the narrow ground that the business of insurance is not a trade."

Lord Watson, however, in the case above cited, *Attorney-General for Ontario v. Attorney-General for Canada* (*k*), has something to say upon the *Citizens Ins. Co. v. Parsons*, which has a very important bearing upon the matter under discussion. He says:

"The scope and effect of No. 2 of sec. 91 were discussed by this Board at some length in *Citizens Insurance Co. v. Parsons*, where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade."

It will be perceived from this that in Lord Watson's opinion it was only in absence of legislation by the Parliament of Canada, covering the same matter, that the local legislature had power to deal with contracts of insurance in the province.

It is not to be forgotten that the Parliament of Canada has dealt with the subject of insurance from the date of the very earliest exercise of its powers of legislation. There has been scarcely a session of Parliament in which some legislation on this subject has not taken place; and what is of very great importance to our inquiry, the Parliament of Canada, by the 27th and 28th sections of the Insurance Act of 1886, being 49 Vict. cap. 45, enacted two most important conditions which thereafter should attach to life insurance contracts. These sections read as follows:

"27. No condition, stipulation or proviso modifying or impairing the effect of any policy or certificate of life insurance issued after the first day of January, one thousand eight hundred and eighty-six by any company doing business within Canada under the authority of the Parliament of Canada,

(*k*) L. R. (1896) A. C. 363.

shall be good or valid unless such condition, stipulation or proviso is set out in full on the face or back of the policy."

Sec. 28. "No policy or certificate shall contain or have endorsed upon it any condition providing that the said policy or certificate shall be voided by reason of any statement contained in the application therefor being untrue, unless such condition is limited to cases in which such statement is material to the contract."

These clauses have never yet been held ultra vires of the Dominion Parliament.

No stipulations more far-reaching, or interfering more seriously with the civil rights of the parties in matters of contract can well be conceived. If the Parliament of Canada had authority to deal in this way with contracts of life insurance, it is difficult to suggest any good reason why the same legislative authority does not exist with respect to contracts of fire insurance.

The result of this review of the cases leads to the following conclusions:

1. Both the Parliament of Canada and the Provincial Legislatures have authority to legislate respecting contracts of fire insurance, the former dealing with matters of trade and commerce, the latter as affecting property and civil rights.

2. In the absence of Federal legislation, Provincial legislation on the subject is intra vires and binding upon all insurance corporations carrying on business within the Province.

3. Upon the Federal government legislating on the subject for the whole Dominion, such legislation will supersede the Provincial legislation when they come in conflict.

E. R. CAMERON.

## EDITORIAL REVIEW.

**Surviving Partner's Liability.**

In *Campbell v. Farley*, 18 P. R. 97, a decision was given which, though correct in the result, contains dicta which at first sight appear to ignore the existence of a statute affecting the question: R. S. O. cap. 129, sec. 15.

The case in question was an action by a creditor of a partnership against the surviving partner and the administratrix of the deceased partner. The administratrix had taken out an administration order, and the estate was in course of administration by the Court. An application was made by the administratrix to stay proceedings, on the ground that the estate of the deceased partner was being administered and any claim against it should be brought into the Master's Office. The order was made. In the course of the judgment delivered, however, it is said that "at law, as well as in equity, it was well understood, before the Judicature Act, that a partnership debt was in strictness joint and not several, and that upon the death of one partner the only liability existing at law was that of the surviving partner, the estate of the deceased partner being only made available through the equities existing in favour of the surviving partners, which the partnership creditors were allowed to make use of: *Kendall v. Hamilton*, 4 App. Cas. 504, 517; *In re Hodgson*, 31 Ch. D. 177. The Judicature Act, as is pointed out in these cases, has not converted into a joint and several debt that which had theretofore been merely joint."

That is true, apart from statute. But the Act referred to enacts that "In case any one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise entered into by such joint contractors, obligors or partners, may proceed by action against the representatives of the deceased contractor, obligor or partner, in the same manner as if the contract, obligation or promise, had been joint and several, and this, notwithstanding there may be another person liable under such contract, obligation or promise still living, and an action pending against such person, etc."



While the decision may be correct in the result, that, pending administration, the claim must be brought into the Master's office, it appears that the creditor has the statutory right to sue the representative as well as the surviving partner. The action against the surviving partner is not a concurrent remedy, but the principal remedy, including the right to join the executor or administrator of the deceased partner.

**Forfeiture for Non-payment of Rent in the Yukon.**

The practice of law in Dawson City, in the district familiarly known as the Klondike or Yukon Territory, has no doubt its rigours; but it has its humorous side also. It is rumoured that a gentleman lately in practice in Toronto has taken some of the common law with him to the gold regions, if indeed the earliest settlers did not bring it with them when they first entered the country. It is known, of course, that after the sun sets in the winter it does not rise again for three months, or thereabouts, and this is what creates the difficulty and the humour. A landlord who came during the long night to demand his rent met with a refusal, and went forthwith and issued process in ejectment. Now, the tenant is entitled to all defences in law, and when it is a case of forfeiture, all his defences are equally meritorious. He pleads that no sufficient demand was made, and cites Co. Litt. 202*a*, where it is said, "Sixthly, therefore, the place of demand being now known, it is further to be known what time the law has appointed for the same. This partly appeareth by that which hath been last said. For albeit the last time of demand of the rent is such a convenient time before the sun setting of the last day of payment as the money may be numbred and received, notwithstanding, etc." Coke, or those whom he reports, plainly did not anticipate the bringing of the common law of England into the Arctic regions, or the text might have been modified.

This is the humorous side. The serious side, that empties the incident of its humour, is that colonists take with them only the law fairly applicable to the country in which they settle. And Coke's rule is evidently not suited to a country with one night three months long, and an almost perpetual day at the other end of the year. And, after all, if it transpires that the law of England on a modern day has been in-

troduced, it will be found that the rigour of the common law has been modified by a statute dispensing with the strictness formerly incident to the demand, and the humour is only that of a case that might have been.

#### **Fire Insurance Law—Adjustment of Loss.**

We take advantage of the appearance of Mr. Cameron's careful article in favour of a uniform contract of insurance for the Dominion, to point out a very necessary modification of the existing law as to adjustment of losses. We say "necessary," because, under the present conditions, although an owner may think himself perfectly secure, he may wake up to find that the policy by no means represents his security against loss.

Where a partial loss occurs, a survey can easily be made and the amount of damage arrived at, and as long as the damage does not exceed the face of the policy the owner is secure. But—and this is the point—the policy plays no part in the computation of the damage. And the insured, who is under the impression that he may rely on the policy as a basis of computation, is suddenly confronted with the demand that he prove the value apart altogether from the amount of the insurance. He has then to face a host of witnesses called by the underwriters, which witnesses make a profession of going about and valuing down losses—expert men, who have only to express their opinion, not give facts, and thus save their consciences.

If the loss is total, the insured is in a still worse position. He has to put his whole case in the hands of the insurer first. If he does not do so, he forfeits his policy. If he does, the expert underwriters set to work to cheapen the value of the building as presented by the insured; they hunt up the usual lot of jerry builders who can build a building of the same kind for half or two-thirds the insurance money; they secure bits of decayed timber, etc., from the wreck; and when an offer is made insufficient to recoup more than half the loss, and the insurer is asked to re-build, he refuses on the ground that that is his option, and forthwith commences arbitration. The insured is under the disadvantage of having put his whole case in the hands of his opponents, and has to fight them as if he were a culprit who had over-insured and was

trying to defraud the insurer. And, in the end, if he receives less than the full amount of his policy, the insurers keep the extra premium which they have been receiving, perhaps for years.

To make the contract of insurance a perfectly honest one, the insurers should be taken *prima facie* to have made a contract based upon truth. It is a familiar saying with underwriters that they will take any sized risk and receive the premiums, but that they will only pay actual loss. This is a distinct inducement to a dishonest insurer to over-insure, and try and make the whole amount in case of loss. It is a snare to an honest insurer, who puts his own valuation on his building, and naturally assumes that the insurers admit it by insuring. The present system has its disadvantages to both sides. If the underwriter never inspects or values his risk while it is standing, he is not in a very good position to value a total loss when it occurs. And he puts the insured to a great deal of expense and trouble by simply admitting liability, which protects him from an action, and denying the amount of the loss, and thus compelling the insured to go into a ruinous arbitration.

This unsatisfactory state of affairs has been remedied in the State of Missouri by statute. By Rev. Stat. Miss. (1889), sec. 5897, it is enacted as follows:—

“In all suits brought upon policies of insurance against loss or damage by fire hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value, below the amount for which the property is insured, the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant; and in case of partial loss, the measure of damage shall be that portion of the value of the whole property insured, ascertained in the manner hereinafter prescribed, which the part insured or destroyed bears to the whole property insured.”

By section 5898, where there is insurance in more than one company, the defendant is not permitted to deny that the property insured was worth the aggregate of the several policies; and depreciation in like manner is to be apportioned. These two sections apply to real property only, and any condition to the contrary is void.

By sec. 5889, where there is a partial loss, the insurer is bound either to pay a sum equal to the damage, or to repair the property to the extent of such damage, not exceeding the amount of the policy, so that it shall be in as good a condition as before the fire, at the option of the insured.

These enactments are eminently just and tend to make the contract of insurance what it ought to be—an honest one from the beginning. If the underwriter is willing to take a risk of \$10,000 on a building, he ought to be held to it that that is the loss in case of total destruction, particularly as he is paid for carrying that risk. *A fortiori* is this the case where an insurer consents to additional insurance up to a figure named. To permit an underwriter to receive premiums for a certain figure, dispute the value and keep the extra premiums received is to encourage the worst species of dishonesty. It is objected that insurers would be put to a great deal of trouble in valuing properties, if they had to ascertain their insurable values first. That is true, but until some means of carrying on business without trouble is devised, it is not too much to ask them to value their risks before and not after loss. Half the trouble which is expended in canvassing for risks would suffice to inspect and ascertain the insurable value of the property, and would do more to bring business to an underwriter than all the canvassing he could do.

Again, where an underwriter makes an offer below the face of the policy on a total loss, he ought to be compellable to re-build at the option of the insured. The condition permitting the insurer to re-build at his option is a farce, and an injustice to the insured.

It is to be hoped that if legislation should be projected overhauling the conditions of contracts and making them uniform for the Dominion, the very reasonable and business-like enactment above quoted will receive due attention.

## CORRESPONDENCE.

**Amendments to the Law.**

*To the Editor of THE CANADIAN LAW TIMES,—*

Sir,—I have read with interest a letter appearing on page 77 of your current volume, entitled “Amendments to the Law,” proposing certain alterations of the law regarding chattel mortgages. Will you kindly allow me space for a few remarks on the same subject?

Your correspondent says: “The law relating to the requirements of a valid chattel mortgage is in a highly technical, not to say dangerous, condition.” He then goes on to point out that the main object of the Bill of Sales Act is, as in the case of the Land Registry Act, to protect the public by requiring notice; and he argues that the provisions of the latter act making actual notice equivalent to registration, should be made to apply equally to dealings with land and chattels.

There are then two questions raised, (first) whether it is politic to permit the holder of a chattel mortgage who has neglected to register it, to raise a question of actual notice, in issues between himself and third parties claiming the goods; (secondly) whether the strict rule requiring rigid adherence to formalities prescribed by the Act, in order to constitute a valid chattel mortgage should be adhered to. With regard to the first point, it may be said that it is open to question whether the provision that actual notice shall be equivalent to registration is desirable, even in the case of land. The principle of the Land Registry Act in British Columbia is opposed to this rule; it being there provided (subject to certain peculiar exceptions) that “no purchaser for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice, expressed, implied, or constructive, of any unregistered title, interest or disposition, for a term not exceeding three years, any rule of law or equity notwithstanding.” If then it may be considered inadvisable to allow actual notice to take the place of registration in the case of instruments affecting land, much more may it be said to be so in the case

of instruments affecting chattels. Questions of notice affecting articles which may be moved, mixed with others of the same nature or destroyed, are, of necessity, difficult and hazardous questions to handle; and it may be wise to forbid any such questions arising where they could only do so in consequence of neglect in complying with the Act by the very person wishing to take advantage of them. See further the principle of the Merchant Shipping Act on this point, as discussed in *Luffman v. Luffman*, 25 App. R. 48.

With regard to the second point raised by your correspondent, it is hard not to sympathise with his view, when one considers the gross hardship which has frequently occurred, through the avoidance by the courts of honest chattel securities. In general, the law provides for a fair and liberal construction of acts of the Legislature; and further, that slight deviations from prescribed forms, not affecting their substance, or calculated to mislead, shall not vitiate them. Why then, the stringent and often harsh adherence to technicalities in the case of chattel mortgages? There must be some good reason, as the courts of Canada are no more remarkable in this respect than those of England. Lord Justice Rigby, in the case of *Sims v. Trollope*, 66 L. J. Q. B. at p. 14, says: "For reasons which seem good to the Legislature, this class of security has come to be looked upon with great disfavour. In some cases the giving of such security is absolutely prohibited, and where it is not actually prohibited all sorts of difficulties are thrown in the way of persons who lend money on these terms." Now, an examination of the English cases leads to the conclusion that in that country, the chattel mortgage is the security of the extortionate money lender; and that sixty per cent. per annum is a very favorite rate of interest charged by these gentry. This fact may account for the disfavour with which chattel mortgages are viewed. Whether the reasons which are accountable for this view are equally valid in this country; and whether, if they are, some more direct legislative remedy is not needed than incumbering the procedure with otherwise useless technicalities, are questions which would seem to deserve consideration.

Yours truly,

Nelson, B.C.

R. M. MACDONALD.

# THE CANADIAN LAW TIMES.

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JUNE, 1899.

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ACTIO PERSONALIS CUM PERSONA MORITUR (a).

BEFORE proceeding to discuss the proposition of law which forms the subject of my thesis, I think it would be neither unprofitable nor devoid of interest, to attempt to trace and ascertain its origin and history; in doing this, it will be necessary to consider briefly the sources from which the laws of England have been derived.

The Roman jurisprudence flourished in Britain for about 360 years, from the reign of Claudius to that of Honorius; during that time, some of the most eminent of the lawyers, whose opinions and decisions make so distinguishing a figure in the civil law, as, for instance, Paulus, Ulpian, and Papinian, are said to have sat on judgment on and dispensed justice to the inhabitants of that country. The interest and inclination of the Roman magistrates disposed them, and power enabled them, to fix the Cæsarian Law with rooted stability in early Britain, during the greatest part of its subjection to the Romans. At the close of that period, it is not very probable that any other rule of municipal law prevailed besides that of Rome.

The successful invasion of the Saxons, and the consequent prevalence of their customs in the succeeding ages, won the esteem and confidence of the conquered natives, and formed, it is supposed, a further basis of our laws. The institutions of the invaders were necessarily interspersed with some Danish usages; but little of our legal polity is derived from that source.

(a) Thesis written for the degree of Doctor of Civil Law at Trinity University, Toronto, in May, 1898.

The greatest innovation that was ever made in the early English laws was accomplished by the Norman conquest, and this was the date of transplanting the feudal law into England as a general authoritative system. Whether any strictly feudal principles had before prevailed is a disputable point; but, on the authority of Spelman, something similar is said to have been in practice before that period of our national and legal history.

The feudal law itself varied much in different ages, being of indefinite antiquity and in established use among the northern warriors when they overswept the Roman Empire with their victorious legions. Its essential character is to constitute and define the relation of lord and vassal; of the lord, who is supposed to be the ultimate proprietor of the whole realm; and of the vassal, who, in consideration of lands granted to him, is bound to perform military service, and to render homage and reverence to his feudal superior.

About the middle of the twelfth century, the discovery of the Pandects of Justinian by Pisan soldiers at the sack of Amalfi, gave rise to a studious and spirited affection for the Roman law throughout Europe; the revival of the study of this art, then sunk by means of the irruptions of the barbarous nations into an almost total oblivion, first appeared in Italy, and afterwards in every other country on the continent where letters and learning were esteemed. Lectures in the science were read in England by Vicarius in A.D. 1149, under the patronage of Archbishop Theobald, both at the archiepiscopal palace at Lambeth and at the University of Oxford; not long after Irnerius, the first of the glossatores, had founded a school for the same purpose at Bologna. During the reign of King Stephen the study of the civilians was denied to his subjects by that monarch; notwithstanding this, it was still studied with avidity in the schools and monasteries of the clergy, whose chief and favourite employment it was. From the reign of Stephen to that of Edward III. it was held in great and general estimation in England, not in deference to any authority, or from universal reception elsewhere, but from its own intrinsic worth.

The Saxon, the feudal, and the Roman systems, have to this day left marks of their existence on the laws of our own



common country. Trial by jury and many doctrines respecting crimes and punishment are of Anglo-Saxon origin; the laws of real property are largely founded on feudal principles; and in contracts affecting personal property we have adopted in many cases the rules and reasoning of the civilians (*b*). The oldest publication on the common law is that of Glanvil, Lord Chief Justice in the reign of Henry II., and the beginning of the preface to that work is said to be a direct imitation of the Proemium to the Institutes of Justinian. Both the words and the doctrine of the same book are quoted by Bracton, a Judge in the time of Henry III., in his treatise *De Legibus ac Consuetudinibus Angliæ*; and other authors, as occasion served them, have used the maxims and principles of the Roman law. Our legal apophthegm "that no man shall take advantage of his own wrong" appears but a translation of the language of Ulpian: "*Nemo ex suo delicto meliorem suam conditionem facere potest*:" Dig. L. t. xvii., 134, I.; 3 Inst. 713. The rule that "An Englishman's house is his castle" seems to have been borrowed from the Digest, for "*Domus tutissimum cuique refugium et receptaculum ideoque nullum de domo sua in jus vocari licere*:" Dig. II. IV. 18. Upon questions arising on wills of personal estate (*c*), legacies (*d*), donations mortis causa (*e*), and generally where the positive law is silent (*f*), our Courts and Judges have frequently and unreservedly resorted for arguments and illustrations to the monuments of the Roman civil law.

Much of the practice and procedure of our Courts that existed before the law reforms of this century, have been plainly borrowed from the Roman. One of these instances is the power of the Attorney-General to file information ex officio; which seems to be taken from the civil law, where there was always a public prosecutor. Then again the old

(*b*) See *Pillans v. Van Mierop*, 3 Burr. 1670, on the doctrine of consideration: *Coggs v. Bernard*, 1 Smith L. C. 288, 390, on the law of bailments.

(*c*) *Anon.*, 1 P. W. 267.

(*d*) *Milner v. Milner*, 1 Ves. 106.

(*e*) *Ward v. Turner*, 2 Ves. 431.

(*f*) *Calvin's Case*, 7 Rep. 18.

form of trial in the English Court of Chancery was evidently derived from the same source; first comes the petition or bill; then the answer or defence; to these succeed replications, exceptions, interrogatories, witnesses privately examined, the sentence of a Judge in writing without the intervention of a jury; and, if necessary, an appeal to the House of Lords. All these steps in an equity cause are distinctively Roman, and their presence in our system can be easily accounted for, when we remember that all the Chancellors in England from the Norman Conquest to the Reformation, that is, from Archbishop A' Becket to Cardinal Wolsey, were accomplished and proficient civilians.

Of course, it is not to be forgotten that great opposition was oftentimes made by our old English lawyers to the introduction of the civil law into England. Nor was it without reason, particularly in matters relating to government and the liberty of the subject. The Roman laws of slavery, adoption, the power of the father, legitimation of natural children, possession of goods, and the like, are contrary to the free and liberal spirit of our constitution. But this circumstance does not derogate from the excellence of the law itself—"the fruit of the researches of the most learned men, the collective wisdom of ages, are the ground work of the municipal law of most of the countries in Europe." (g)

Having now shown that much of our municipal law is derived from the civil institutions of Rome, it may be asked, does the trite and familiar principle of law expressed in the maxim, "*actio personalis cum persona mortur*," come from the same source? or, if not, whence is its origin? Though Lord Justice Bowen says (h): "Its origin is obscure and post-classical," I think that the Roman civil doctrine of transmission of actions, if not the parent, is a very near and close relative of this somewhat irrational principle that seems to be firmly and unalterably rooted in our system of national jurisprudence? The civil idea of an "action" differed in no important respect from our own. Justinian defines it as "nothing more than the right of suing in a court of law for

(g) Per Tindal, C.J., in *Acton v. Blundell*, 12 M. & W. 353.

(h) *Finlay v. Chirney*, 20 Q.B.D. 502.

our just demands" (j). The same author, speaking of those actions which do and those which do not pass to the heirs, says: "Non autem omnes actiones, quæ in aliquem aut ipso jure competunt, aut a prætore dantur et in hæredem æque competunt, aut dare solent. Est enim certissima juris regula, ex maleficiis poenales actiones in hæredem rei non competere; veluti furti, vi bonorum raptorum, injuriarum, damni injuriæ: sed hæredibus hujusmodi actiones competunt, nec denegatur; excepta injuriarum actione et si qua alia similis inveniatur. Aliquando tamen, etiam ex contractu action contra hæredem non competit; veluti cum testator dolose versatus sit, et ad hæredem ejus nihil ex eo dolo pervenit." (j) Cooper, in his excellent edition of the Institutes, gives this translation of the rule just cited: "Not all actions in general, which either the law or the prætor allows against a man will be also allowed against his heirs: for it is a sure rule of law, that penal actions, arising from malfeasance, will not lie against the heir of the offender; such as theft, rapine, injury, or damage injuriously done; but these actions will pass to heirs, and are never denied, but in an action of injury, and in other cases of a similar nature. Sometimes even an action of contract will not lie against an heir; as when a testator acts fraudulently, and nothing comes to the possession of the heir by reason of the fraud." The same learned commentator of the Institutes makes the following gloss on the title on page 655 of his notes: "In England and generally in America 'actio personalis moritur cum persona.' This ought not to be the case in several kinds of action, as battery, mayhem, seduction, etc. Under the Roman law, actions for torts descended to the heirs, but did not survive against the heirs." The concluding sentence states but too briefly what the Roman law was as to the continuity of an action, whenever it assumed the character of a claim for a tort.

The fundamental rule of the civil law with regard to this doctrine, was that all actions are transmitted whether for or against the heirs. To this were two partial and one absolute exception: (1) The actio poenalis, which was an

(i) Nihil aliud est quam jus persequendi in judicio quod sibi debetur. Inst. Tit. VI. "De Actionibus."

(j) Inst. Tit. XII. C. iv. T. 11.

action ex delicto employed to enforce a private penalty: it passed over to the heirs of the injured party, but could not be brought against the heirs of the offender, unless they had been enriched by their testator's delict. (2) The *actio quæ vindictam spirat*, being an action which a man, without having suffered an actual loss of property, brought out of mere resentment for personal injuries. It did not descend to the heirs of the plaintiff, although he might institute it against the defendant's heirs, except as far as it had its ground in a delict. (3) The *actio injuriarum* was the absolute exception to the rule, as it enured neither for nor against the heirs.

That the English common law engrafted the first exception to the civil rule above stated on the municipal institutions of our country, and in doing so misread "personalis" for "poenalis," is a theory that has been ingeniously advanced by more than one of our antiquarians in law, who have endeavoured to discover the origin of this recondite principle that is so closely interwoven in our system of jurisprudence. The similarity attempted, while incomplete and such as may not command the entire approbation of the inquirer, is certainly one that is deserving of some little consideration. Lord Justice Bowen, when delivering judgment in *Philips v. Homfray* (*k*), evidently thought the comparison had some weight, for his Lordship is there reported as saying: "With reference to the history of the maxim, *actio personalis cum persona moritur*, whatever its wisdom or policy, the rule with certain limitations and exceptions is as old as the English law. By the civil law, penal actions arising from wrong were not generally available against the heir, and certain actions ex contractu fell under the same difficulty."

The idea, therefore, if not the strict principle laid down in our maxim, seems to have been borrowed from the civil law; and it does not appear either inconsiderate or extravagant to say that it is derived from the Roman doctrine of transmission of actions which under circumstances unknown became incorporated in our law, and was shaped as at present expressed by the needs and exigencies of a growing society.

(*k*) 24 Ch. D. at p. 356.

In this connection the accurate, perspicuous, and elegant recital of the history of this maxim given by Lord Justice Bowen in *Finlay v. Chirney*, *supra*, is eminently worthy of reproduction as an appropriate conclusion to this part of my thesis; it displays a depth of judicial and historical learning which one would hardly expect to find in such a topic. Another ornament of the English judiciary—Lord Justice Bramwell—has left us in *Twycross v. Grant* (*l*), a summary, brief, yet amply explicit, of the development in early and modern times of the rule of law under consideration. The one will close this part of my investigation, the other will form an introduction to that part of the discussion of which, I have just said, it is such an admirable exposition.

“The liability of an executor in respect of the acts and defaults of his testator has been in the English law a matter of slow growth. The maxim ‘*actio personalis cum persona moritur*’ is one of some antiquity, but its origin is obscure and post-classical. Unless indeed some very restricted sense is affixed to the word ‘*personalis*,’ it is by no means true at the present day that a personal action always dies with the person. Upon the other hand, if the meaning of the maxim is to be limited, it is difficult to reconcile its phraseology with the ordinary classifications of ancient English law. Judges and text-writers since the reign of Queen Elizabeth have been in the habit of explaining upon fit occasions ‘that only actions *ex delicto* were within the operation of the principle. ‘The rule,’ says the learned editor of Williams’ Saunders, vol. I., p. 240, ‘was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed.’ This remark is true, if confined to the law of recent times, but it is inexact, if it be taken as applying to the older English law under which actions based upon an obligation as a rule died with the person. As applied, however, to modern times, the proposition is supported by abundance of authority. ‘*Actio personalis*,’ says Willes, J., in *Sollers v. Lawrence* (*m*), ‘is always understood of a tort;’ and similar expressions occur elsewhere in plenty. But though this gloss or limitation has been forced upon the

(*l*) 4 C. P. D. 45.

(*m*) Willes, 413, at p. 421.

Latin maxim in later times by the exigencies of a growing society, we are still left in the dark as to the maxim's exact meaning or source. The truth is, that in the earliest times of English law survival of causes of action was the rare exception, non-survival was the rule. Moreover, the clear line which we are accustomed at this day to draw between contract and tort in the classification of personal actions does not correspond with the early English law, nor with the history of old English writs and causes of action. Actions of trespass were formerly actions of a quasi-penal character and based upon the supposition of personal wrong. It was not unnatural that such actions should die upon the death of the trespasser. 'All private criminal injuries or wrongs as well as all public crimes are buried,' says Lord Mansfield in *Hambly v. Trott* (*n*) 'with the offender.' But survival was also denied to other actions which did not fall within this category. In Bracton's time the general law was that an obligation was got rid of by the death of either of the contracting parties (*o*). In debt the executor could not be sued when the testator could have waged his law, see *Pinchon's Case* (*p*); a condition of things which continued even down to 1805: *Barry v. Robinson* (*q*); and when we consider that all actions on the case (as is said by Blackstone, J., in *Mast v. Goodson* (*r*), decided in 13 Geo. 3), were originally for torts, and that it was only in the time of Queen Elizabeth that the familiar action of assumpsit was after a controversy introduced, it became plain that it is within the last three centuries that the contractual liabilities of an executor have expanded to their recent limits. Modern jurisprudence has, however, since the reign of Queen Elizabeth, adopted a rough but convenient interpretation of the maxim, which is set forth in the passage above cited from Williams' *Saunders*. On the one side of the line of demarcation lie actions of tort. Remedies for wrongful acts, according to the present law, can only be pursued against the estate of a deceased person when property

(*n*) 1 Cowp. 375.

(*o*) Bracton, fol. 101.

(*p*) 9 Rep. 88 (*a*).

(*q*) 1 B. & P. N. R. 298.

(*r*) 2 Wm. Bl. 848, at p. 850.

or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys: *Philips v. Homfray* (s). On the other side of the line lie actions founded on any contract express or implied, 'or any other duty to be performed.' Early in the reign of James an action was allowed against executors for payment of a debt, if clothed in the form of an action on the case in *assumpsit*: *Pinchon's Case* (t); and this remedial view of the law has been adopted and followed ever since" (u).

"At common law the rule as to torts was correctly expressed by the maxim, *actio personalis cum persona moritur*. This rule was greatly altered at an early stage of our legal history by 4 Ed. III. cap. 7, and this statute being remedial in its nature, and also those amending it, have been construed very liberally: they have been held to extend to all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature. When the value of the testator's personal estate has been diminished, an action will lie at the suit of an executor. This has been established for centuries, and the rule of law has been made still clearer by the legislature, which by 3 & 4 Wm. IV. c. 42, sec. 2, has given a more extended remedy to and against executors for wrongs committed during the lifetime of their testators; for it seems to have been assumed at the time of passing that statute, that an executor was entitled to maintain an action for any wrong whereby the personal estate had been injured. . . . No doubt was thrown upon the authorities showing that an executor may sue for a wrong committed to the personal estate of the testator during his lifetime; moreover, apart from 3 & 4 Wm. IV. cap. 42, sec. 2, a wide distinction exists between the liability of an executor to be sued and his right to sue" (v).

The rule of law that a personal action dies with the person is, as we have seen as old as the law itself, and few rules are better established both by consent of ancient and

(s) 24 Ch. D. 439 at p. 454.

(t) 9 Rep. 89 (b).

(u) Per Bowen, L.J., *Finlay v. Chirney*, 20 Q. B. D. 503.

(v) Per Bramwell, L.J., *Twycross v. Grant*, 4 C. P. D. 45.



modern judicial thought. Its equity has been often called into question during the long course of our legal history, for it is difficult to suggest or imagine on what ground death should absolve anyone from the observance or performance of any duty or sacred obligation. The tendency however of our modern tribunals has been to modify if not to actually evade the strict application of this rule, when it is found inconsistent with that spirit of justice which is such a happy characteristic of our own great age.

The word "personalis" in the maxim is unfortunate; for while the rule with certain statutory exceptions applies in all its inflexibility to actions in tort, injuries sustained to the person by the negligent performance of a contract does not fall within the scope of the rule, when there seems to be no good reason why an action on a contract of any kind is not as much as a personal action as one in tort. A writer on this subject has said that "the word 'personalis' may mean anything or everything. It and the maxim which contain it are worthless. . . . The maxim would probably have never acquired such currency, if people had thought that a Latin quotation was an ornament to an opinion or argument." While one may not be prepared to give assent to that opinion, it is too true that the opinions which the rule has called forth in the history of our jurisprudence, have, in the language of Lord Mansfield (*w*), tended "rather to confound than elucidate." With these observations, I shall now proceed to discuss the development and application of the principle expressed in the maxim.

In the older English law the maxim was an almost complete statement of the doctrine as to the survival of actions of all kinds except contracts, replevin, and detinue; for these two latter could always be brought by an executor to recover the testator's goods (*x*). Where an injury was done either to the person or property of another, for which only damages could be recovered, or where the cause of action was founded upon any malfeasance or misfeasance and the declaration imputed a tort and the plea must be "not guilty,"

(*w*) *Hambly v. Trott*, Cowp. 375.

(*x*) *LeMason v. Dixon*, Sir W. Jones, 7,173,174.



the maxim was a complete defence to any action whose object was to obtain satisfaction for these wrongs. So far was this principle carried, that it was formerly doubted whether *assumpsit* would lie for or against an executor; because it was in form an action of trespass upon the case, which supposed a wrong, for which in strictness damages could be awarded; but at an early stage of our judicial history, the law was held otherwise. Two of our older cases establish this: *Slade v. Morley* (y), decided in the reign of Elizabeth, established the law to be "that an action on the case on an *indebitatus assumpsit* lies well; for every debt implies a promise, and is a good consideration in fact to found an action upon. But for a debt by simple contract due by the testator no *assumpsit* lies against the executors." Also in *Palmer v. Lawson* (z), decided in the reign of Charles II., it was held "that although debt on simple contract cannot be recovered against an executor by action of debt, yet it may be by *assumpsit*." These authorities also show that actions of debt on simple contract did not lie for or against representatives; and the reason was, not it is said that the action died with the person, but because the testator or intestate might have waged his law, that is, might have cleared himself by his denial upon oath of the justice of the demand, attended by the other requisites appropriated to that species of defence (a); and this the executor could not do. An exception to the rule existed in the case of rent due after a testator's death, or when the undertaking to pay originated with the representatives, and this for the same reason in one case, that the testator himself if alive could not have waged his law, and in the other because the contract originated with the executor or administrator himself. The case of *Ridell v. Executors of Sutton* (b) establishes this. Per Best, C.J.: "It has been objected on her part, first, that an action of debt does not lie against an executor; but the principle on which that has been decided is that an executor cannot wage his law for a debt contracted by his

(y) *Yelv.* 80.

(z) *Levinz*, 201.

(a) *Pinchon's Case*, 9 Rep. 87 b.

(b) 5 Bing. at p. 306.

testator; it does not apply therefore to a case like the present, when the undertaking to pay has originated with the representative, who is therefore better acquainted with the transaction than the testator could have been." This anomalous condition of the law as to debt was acknowledged in our Courts as late as 1805, for Sir James Mansfield in *Barry v. Robinson* (c) is reported as saying: "that the distinction between actions of debt and assumpsit, as applicable to the case of executors, is not founded on good sense, but still this distinction has always been recognized by the law. Ill-founded as it is, we must nevertheless act upon it, for it is not in our power to alter the law." Of course it must not be forgotten that debt might be sued for against a personal representative, if clothed in the form of an action of assumpsit, so that the distinction after all was of little consequence, being one strictly of form. At length the Legislature intervened by 3 & 4 Wm. IV. cap. 42, sec. 13 of which abolished wager of law, and sec. 14 gave an action of debt in simple contract in any Court of common law against any executor or administrator. This latter section is re-enacted in the Revised Statutes of Nova Scotia, 5th series, cap. 113, sec. 3.

An action of account did not at the common law lie either for or against an executor, for the reason that the account rested in the privity and knowledge of the testator (d). But a series of statutes on the subject extending from the time of William Rufus to that of Anne give an action in account both for and against representatives.

I have already pointed out that the scope of the principle laid down in the maxim has in modern times been limited to tort; that personal actions founded upon any contract, covenant, or any other duty to be performed, did not fall within the operation of the rule. It is to be noted, however, that in a contract that is personal to the testator, no liability attaches to the personal representatives, unless a breach was incurred in the lifetime of the deceased. The case of *Hyde v.*

(c) 1 B. & P. N. R. 293.

(d) 1 Wms. Saunders, 314n.

Dean and Canons of Windsor (*e*) is instructive on this point as showing the state of the law at a very remote period of our legal history. It is there laid down that "covenant lies against an executor in every case, although he is not named; unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform" (*f*).

*(To be Continued.)*

JOHN J. POWER.

(*e*) Cro. Eliz. 353.

(*f*) See also *Seboni v. Kirkman*, 1 M. & W. 418; and *Williams on Executors*, 9th ed., p. 1596; *Wentworth v. Cook*, 10 A. & E. 45.

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## HISTORICAL ACCOUNT OF THE COURTS OF JUDICATURE IN NOVA SCOTIA.

*(Concluded.)*

As this concludes that part of my subject relating to the establishment of the early common law courts in this Province, culminating in the constitution of the Supreme Court with Chief Justice Belcher at its head, it is a fitting place to make some reference to that eminent Judge. In the archives Mr. Aikins in a note gives the following brief biographical sketch.

“Jonathan Belcher was a second son of Governor Belcher of Massachusetts. He graduated at Harvard, Cambridge, and was educated for the profession of the law. He afterwards went to England to complete his studies, when he became a member of the Society of the Middle Temple. He received the appointment of Chief Justice of Nova Scotia in 1754. Soon after assuming that office, he urged upon the Government the necessity of calling a representative assembly, being of opinion that the Governor and Council under the Governor's commission and instructions did not possess the power of levying taxes. The earliest enactments of the Legislature which form the groundwork of the Statute Law of Nova Scotia were prepared by him. Chief Justice Belcher was President of Council, and administered the government of the Province on the death of Governor Lawrence in October, 1760. He died in Halifax, 1776, aged 65, leaving a son and daughter. The House of Assembly allowed a pension to his daughter until her marriage. His son, the Hon. Andrew Belcher, was for several years a member of the Council. He was father of Vice-Admiral Sir Edward Belcher, distinguished for his nautical surveys on the Coast of Africa and the Arctic seas. Sir Edward was born at Halifax and educated at the old Grammar School on Barrington Street under the Rev. George Wright.”

It may be interesting to add the following description from Murdoch's History of the inaugural proceedings on

Chief Justice Belcher's first presiding in the Court: "On Monday, 14th October, Jonathan Belcher, the newly appointed Chief Justice of the Province, was (by H. M. Mandamus) sworn in as a member of the Council, after which the Council adjourned to the Court House, where after proclamation made for silence, the King's commission appointing Charles Lawrence Lieutenant-Governor was read in public. He was sworn in and took the chair. The Council addressed him in congratulation, and he made a suitable reply. A commission by letters patent for the Chief Justice was prepared, and on the 21st October (Monday) it was read in Council, and the Chief Justice took the usual oaths of office. On the first day of Michaelmas term the Chief Justice walked in procession from the Governor's house to the Pontac—a tavern. He was accompanied by the Lt.-Governor Lawrence, the members of the Council, and the gentlemen of the bar in their robes. They were preceded by the Provost Marshal, the Judges' tipstaff and the civil officers. At the long room of the Pontac an elegant breakfast was provided. The Chief Justice in his scarlet robe was there received and complimented in the 'politest manner' by a great number of gentlemen and ladies and officers of the army. Breakfast being over, they proceeded with the commission carried before them to the church (St. Paul's), where the Rev. Mr. Breynton preached from this text: "I am one of these that are peaceable and faithful in Israel." A suitable anthem was sung. After this they proceeded to the Court House, handsomely fitted up for the occasion. The Chief Justice took his seat under a canopy with the Lieutenant-Governor on his right hand. The Clerk of the Crown then presented the commission to Mr. Belcher, which he returned. Proclamation for silence was made; Belcher gave some directions for the conduct of practitioners; the grand jurymen were sworn and the Chief Justice delivered his charge to them. After this the Court adjourned, and his Honour the Chief Justice, accompanied and attended as before, went back to the Governor's house. Such was the first opening of the Supreme Court of Nova Scotia."

This very graphic description recalls to us the dignity and solemnity with which our ancestors surrounded the Courts

of Justice, still preserved in England, and it is not clear that we in this country have gained anything in throwing aside many of the outward forms and ceremonies, so impressive on such occasions. When the Judges of His Majesty's Supreme Court ceased to wear the scarlet robe, and Judges and barristers alike cast aside the wig, I have not been able to ascertain. That they continued to do so at the end of the last century is evident from the portraits of Chief Justice Strange and Chief Justice Blowers, both of which formerly adorned the Legislative Council Chamber, and now the portrait of the latter, I regret to say, is hidden away in one of the ante rooms of the House of Assembly. Since writing this, in conversation with Senator Dickey, the senior member of the Bar in this Province, I learn that when he first commenced practice in 1834 the Judges then wore their wigs in Court, but not the barristers.

In these observations I have, to some extent, wandered from my text. Having traced step by step the erection and constitution of the General, County and inferior Courts, I must not omit to state that Cornwallis and his council at the same time instituted the Court of General Sessions, stated by Haliburton to have been similar in its nature, and conformable in its practice to Courts of the same name in England.

This Court was composed of the Justices of the County Court, and afterwards of the Inferior Court of Common Pleas, associated with all Justices of the Peace. It has not been made very clear to me exactly to what extent they exercised jurisdiction in civil and criminal matters, and it seems probable that their functions were chiefly discharged in providing local regulations for the town, although doubtless some matters of a judicial nature were heard before them.

Haliburton in his brief account of our Courts, Vol. I., p. 164, says, "That in the year 1752, in consequence of many difficulties having arisen from the practice of the County Court, it was abolished, and a Court of Common Pleas erected in its place upon the plan of the Inferior Court of Common Pleas in New England. This Court sat four times a year, and the Judges were selected from among those who had presided in the County Court. Similar inconveniences

having arisen from the peculiar construction of the General Court, His Majesty in the year 1754 appointed Jonathan Belcher, Esq., Chief Justice of Nova Scotia, and a new judiciary was erected in the place of the General Court, styled, The Supreme Court, Court of Assize, and General Jail Delivery, in which the Chief Justice was sole Judge, but the new Court assumed no other powers or jurisdiction than what had till then been exercised by the General Court."

In a note he further informs us, "The practice in the Supreme and Inferior Courts continued the same until the convention of the House of Assembly in 1758, when the practice of the Common Pleas was changed by a temporary Act of Legislation and a new mode prescribed compounded partly from the practice of Massachusetts, and partly from the practice of England. Upon the expulsion of the neutral French, and the introduction of the new inhabitants as settlers, new counties were erected, and the Courts of Common Pleas became multiplied. Thus constituted, the Courts continued and practiced until 1764, when a change took place in the Supreme Court. Upon an address of the House, Governor Wilmot added two assistant judges, and appointed two members of Council to fill these situations. The powers granted to the assistant Judges by these commissions (which were drafted by the Chief Justice) were so qualified and limited that the intent of the Assembly was altogether frustrated—not having power to try a case but in conjunction with the Chief Justice, or even to open or adjourn the Court without his presence and concurrence."

With the arrival of Chief Justice Belcher commenced a new era in our Judicial annals. Hitherto no one pretending to the necessary qualifications of a Judge had presided in the Courts. Belcher was a man of good ability, good education, of experience in legal proceedings, and of a vigorous and determined character. This is evidenced by the reforms and improvements he undertook and carried out until the first Assembly was called in 1758. Cornwallis' commission authorized the summoning of an assembly chosen by the people, but in the then state of the province it could not be carried into effect. Five years and more had elapsed before

Belcher came and the condition of affairs had considerably changed. He, it appears, had doubts as to the validity of at least some of the Acts and regulations of the Governor-in-Council, and pressed strongly for the calling of an elected assembly. The subject was considered in Council and he drew up a scheme for the election of members in the different inhabited districts of the province. It was submitted and discussed at great length, and finally adopted after peremptory instructions from England came to call the assembly. The Attorney and Solicitor-General of England, Murray and Lloyd, gave their opinion, "that the Governor and Council alone are not authorised under his commission and the royal instructions to make laws. Till there can be an assembly, his Majesty has ordered the Government of the infant colony to be pursuant to his commission and royal instructions, and such further directions as he should give under his sign manual, or by order in Council.

The Lords of Trade appear to have been much concerned over this matter, and I find among their despatches to the Governor, dated May 7th, 1755, the following reference to the subject: "As the validity of the laws enacted by the Governor and Council or the authority of those acting under them does not appear to have been hitherto questioned, it is of the greatest consequence to the peace and welfare of the Province that the opinion of His Majesty's attorney and Solicitor-General should not be made public until an Assembly can be convened, and an indemnification passed for such acts as have been done under laws enacted without any proper authority." This suggestion, as will subsequently appear, was carried out, and no doubt the perilous position in which the Governor and Council and the officers acting under them found themselves hastened the measure for calling the Assembly.

On Monday, January 3, 1757, the necessary resolutions for the purpose were passed in Council. On Monday, October 2, 1758, the newly elected members met at the Court House, 19 in number, and were sworn in. They elected Robert Sanderson their speaker; the Governor-in-Council constituted the other House, and the two the civil Legislature of the Province. Thus came into existence the only body which henceforth could make laws for the Province.



The hand of Belcher is plainly visible in the early legislation of the province. The late Dr. Aikins informed me that it was he who arranged and revised the laws which appear in our first Statute book, as appears by the copious notes and memoranda in his handwriting in the copy of the British Statutes at large in our Law Library. He adds, what may be of interest to the Bar Society, that many of the books which formed the foundation of this library are supposed to have been originally his property.

Mr. Uniacke in his compilation of the Statutes published in 1805 says: "Finding that an edition of the Acts of the Province up to the sixth year of his present Majesty's reign (George III.) was published by the late Chief Justice Belcher with notes of law cases and marginal references to British Acts of parliament, I considered it proper to republish the same notes and references in this work, not only as a mark of respect to the high and learned character of Mr. Belcher, who was the first Chief Justice of the province, but also as affording the people of the Province a convincing proof that our predecessors anxiously endeavoured, as nearly as local circumstances would permit, to copy the laws of the mother country, and to form our establishment agreeably to the British constitution."

We must now turn our attention to the Journals of the House of Assembly and to the Statutes of the Province, and follow the course of legislation as regards the courts. One of their first acts was on October 3rd, to pass a resolution requesting the Governor that all the resolutions of His Majesty's Governor and Council heretofore made and passed, may be laid before the House, and also the collection of the English Statutes. The Governor having complied with their request, a committee was appointed, October 5th, to inspect and examine the resolutions of the Governor and Council and report to the House which of them ought to have the force of law. This report was adopted, and it was decided to incorporate the same in one General Act.

October 9th they voted that a Bill be passed for confirming the past practice of the Courts of Judicature and establishing their practice for the future, and on October 11th an Act was passed, 32 George II. chap. 27, entitled "An Act for

confirming the past proceedings of the Courts Judicature, and for regulating the further proceedings of the same. "Be it enacted: That His Majesty's Supreme Court, Court of Assize and General Gaol Delivery shall be held, and kept at the usual times and places (that is to say) on the last Tuesday in the month of October and on the last Tuesday in the month of April in every year in the town of Halifax, and that a Court of General Sessions of the Peace shall be held quarterly, as usual, in every year in the said town, that is to say, on the first Tuesday in the months of December, March, June and September, and that the Inferior Court of Common Pleas shall be held as usual on such first Tuesday in said months of December, March, June and September." The last clauses ratified and confirmed all proceedings to date.

At the same session another act was passed, entitled "An Act for confirming the past proceedings of the Court of Judicature, and for regulating the further proceedings of the same," and then another entitled "An Act in addition to and in further explanation of the last Act," which completed the legislation directly bearing on the status of the Courts and their proceedings. Thus was ratified and placed on a sound and legal footing all that had been done in our Courts up to this time.

In the following sessions Acts were passed dealing with many subjects, over which jurisdiction was conferred upon the Courts, but none intimately associated with the present subject until the year 1763, when the House of Assembly represented to the Governor-in-Council the desirability of having two more Judges in the Supreme Court associated with the Chief Justice, among other reasons, saying, "As it is conceived His Majesty's subjects ought not to rest satisfied with the judgment of one person only, and further that so important a Court should not consist of one man however capable and upright."

On the 22nd June, 1764, the Council advised that two assistant Judges of the Supreme Court be appointed in accordance with the address of the House of Assembly, and on July 13th, 1764, the Lords of Trade answered the application of the House of Assembly that two assistant Judges will be appointed so soon as they made provision for payment of

their salaries. This was done, and in 1764 the Hon. John Collier and Charles Morris were appointed assistant Justices of the Supreme Court. On the 26th April, 1769, the Hon. John Duport succeeded Collier, and on the 24th May, 1770, the Hon. Isaac Deschamps succeeded Duport, who was appointed Chief Justice of P. E. Island (or then known as Island of St. John). I do not follow the list of succeeding Judges, which can be easily traced.

The next Act of importance affecting the Courts was passed in the session of 1768. By 8 & 9 George III., cap. 5, an Act was passed authorizing four terms of the Supreme Court to be holden at Halifax, that is to say, on the first Tuesdays of January, April, July and October in each year. The reason assigned in the recital was the long and injurious detention of prisoners awaiting their trial for crimes alleged against them and thereby "weakening the force and terror of the law, and also the delay in hearing and determining causes of property in said Court."

Up to this time, in fact until 1774, the Supreme Court only held its sittings or terms at Halifax. There were no terms in any of the counties, or districts, at that time laid off. Before this, terms for the sittings of the Inferior Court of Common Pleas had been provided by statute in a number of places. It is a matter of interest and some importance to find out how and in what way the Circuits of the Judges of the Supreme Court were first arranged, and under what authority the different Judges held Courts of Assize and General Gaol delivery in the various counties. The Judges do not in this Province, as in England and in some of the other Provinces, receive special commissions for that purpose, and, so far as I can ascertain, there never were any commissions for that object issued in the Province. I can find none in the Records preserved in the archives, nor were any orders in Council passed granting them.

Subsequent research leads me to qualify this statement to some extent. I do find in the earlier records of the Council that commissions for holding Courts of assize and general gaol delivery were directed to be issued, but such commissions

apparently ceased after the first Legislature was convened, except in some special cases to which allusion will be made hereafter.

The authority under which the Judges act is based on the Statutes passed at different periods as they became necessary, fixing the times and places at which sittings of the Court for the discharge of civil and criminal business were to be held.

The first was enacted in the year 1774, 14 & 15 George III. cap. 6, entitled, "An Act in addition to and in amendment of an Act made in the eighth year of His present Majesty's reign entitled An Act for establishing the times of holding the Supreme Court."

As the recital in this Act is valuable from an historic point of view, I give it in full:

"Whereas many and great inconveniences have arisen, and daily do arise for want of a more speedy and full administration of Justice in the several counties in this province; that many suitors living and residing therein do sue and prosecute their actions and causes of complaint in the Supreme Court at present held only at Halifax, and that their being obliged to come from a great distance themselves, and bringing their witnesses is very detrimental, as well as expensive to them, and great injury is thereby done to individuals as well as to the public good of the province; And whereas his Majesty has been pleased to grant a commission, and appoint a Supreme Court, Court of Assize and General Delivery, to be holden in and through the province, exercising the powers of the several Courts of King's Bench, Common Pleas, and Exchequer in England, and that the holding of said Court at Certain stated times in such counties to which there is communication with the town of Halifax by land, will greatly contribute to the security of the right of the Crown as well as to the ease and welfare of His Majesty's subjects in this Province.

Be it therefore enacted by Governor, Council and Assembly, That the said Supreme Court shall from and after the thirtieth day of September next be holden in the several towns and counties at such times and in such manner as are hereafter mentioned, and that the said Supreme Court shall

be, and is hereby empowered to proceed at the several sittings in and as near the same manner as hath heretofore been used in the said Court sitting at Halifax, and that the several laws of this province respecting jurors shall extend and be construed to extend to the holding of the said Supreme Court at the said several times and places, and that all the proceedings, rules, judgments and executions of the said Supreme Court legally had made and done in and at their sittings and terms, and at the said several places, shall be good, valid, and effectual to all intents and purposes whatsoever.

II. And whereas it may be attended with inconvenience that all and every of the Judges of the said Supreme Court should be present at the several sittings of the said Courts, Be it enacted that any two of the Judges of the said Court shall be sufficient for holding the same, and transacting the business thereof at all and every of the times and places hereafter mentioned, and the legal proceedings then and there had shall be to all intents and purposes whatsoever as good and effectual as if all the Judges of the said Court were present.

III. Section 3 then specifies the places, that is to say, Halifax, Horton in Kings County, at Annapolis and at Cumberland in the county of Cumberland. The particular time for holding the terms is not specified, but the length for which the Court could sit was limited in Halifax to 14 days, unless of unavoidable necessity, when it might be continued for six days longer; in the other places, not to sit longer than five days from the opening of the Court.

This statute discloses to us the foundation of our Circuit Courts, and the reasons for their constitution, but it also discloses two other facts not generally known at the present time (1) That the two judges of the Supreme Court then presided at every sitting of the Court on each Circuit. (2) That the Circuit Courts as so constituted were not simply Courts of *Nisi Prius* as in England, but were invested with all the powers and jurisdiction of the full Court sitting at Halifax, and that jurisdiction continues until the present day except as modified by subsequent legislation and our rules and orders. As every lawyer knows, this is a matter of great importance in the administration of justice.

There was however a curious exception made to this state of things by a temporary Act passed in 1794, 34 George III. cap. 10, entitled "An Act providing for the Trial of Issues by Justices of Nisi Prius in the counties of Syndey, Lunenburg, Queen's County and Shelburne. The recital explains the necessity: "Whereas it is highly expedient for the due administration of justice that Courts of Nisi Prius shall be established in the several counties of this province, in which his Majesty's Supreme Court are not now by law authorised to sit." It then proceeds to enact that in the above named counties it shall be lawful for the Governor to assign one or more justices of the Supreme Court, joining with him either one or more of the Justices of the Inferior Court to try such issues by a jury of the county, which justices shall proceed in the same manner as justices of Nisi Prius in England and with the same power and authority. The Governor was to issue a commission for holding such Courts and specify a day for the same between April 1st and October 1st. Then follows a further recital that whereas there are no practicable roads from Halifax to these several Counties by which they may be able to attend the places at the day named, the sheriff may respite the attendance of jurors and witnesses until the Justices arrival. This Act was to be in force for three years. In 1804 by a general Act, 44 George III. cap. 3, I find this Act was continued for one year, which induces me to think it had been kept alive in the meantime by temporary Acts not to be found.

It would be a tedious and unprofitable task to follow in detail the numerous changes made by the Legislature by which the present circuits of the Supreme Court were finally evolved. I merely purpose to draw attention to some of the more important and curious features in the exercise of judicial authority.

From cap. 13 of 46 George III. passed in 1805 and cap. 15 of 50 George III., passed in 1809, it appears that up to this time it was essential to the jurisdiction of the Court that the Chief Justice should be one of the Judges present. By the first of these Acts any one of the assistant judges was authorized to hold the Supreme Court in any of the Counties associated with any Justice of the Court of Common Pleas,

or any person of the profession of the law duly commissioned by the Governor and Council. By the last named Act it was enacted:

“That the said Supreme Court shall be held in each of the said Counties and districts by two assistant Justices of the said Court in the absence of the Chief Justice and in no other manner whatsoever.” It is further provided that in the event of one of them being sick, or unable to attend, one Judge might hold the Court.

In 1816 by an Act 56 George III. cap. 2, the whole circuits were rearranged and increased, and in those counties where Courts of Nisi Prius had been provided for the Circuit Courts were now established.

The last legislation to which the limits of my paper will permit me to draw attention is cap. 5 of 1 & 2 George IV., passed in 1820, entitled “An Act to extend the Laws and Ordinances of the Province of Nova Scotia to the Island of Cape Breton.”

That Act in the preamble recites what is well known, that the Island had been re-annexed to Nova Scotia as an integral part thereof, and provides among other things that the administration of Justice in the Island shall be conformable to the usage and practice of the Province of Nova Scotia. That the Supreme Court shall be held by the Chief Justice, or in his absence by two of the assistant Judges, or by one of the assistant Judges and the associate Circuit Judge of said Court at Sydney in the said County on the last Tuesday in August, and at Arichat on the first Tuesday of September.

By an Act passed in 1809, 50 George III. cap. 15, provision was made for the appointment of a third assistant Judge to which Foster Hutchinson was appointed on the 10th of June, 1810, thus making four Judges of the Supreme Court. He was the senior member of the Bar and a man of great learning in his profession and of irreproachable character. He belonged to the family of the historian Hutchinson of Massachusetts and was connected with Governor Mascarene. He died 18th November, 1815.

In the year 1816 a new and hitherto unknown experiment was made in connection with the Supreme Court. By the



Act passed in this year, 59 George III. cap. 2, power was given to the Governor to appoint what was termed an Associate Circuit Judge, who in the absence of the Chief Justice, with any one of the Judges should be competent to hold a Court in every County or District. By the 4th section it was provided that the person so appointed should, when invested with the office, be competent to the exercise of all the duties of an assistant Judge of the Supreme Court while engaged in the said Circuit and not otherwise. There was added a proviso that nothing herein contained shall be construed to empower the person so commissioned to perform any of the functions of a Judge or assistant Justice of the Supreme Court at Halifax. Peleg Wiswell, Esquire, was appointed to this office, and, so far as I can find, he was the sole occupant of that anomalous position. It was apparently created in view of the necessity at that time of always having two Judges presiding in the Supreme Court, and the impossibility of the then number of Judges being able to be present at all the Circuits.

By the 4 & 5 George IV. passed in 1824, cap. 28, it was provided that when this office became vacant it should not be filled by the Governor. By a subsequent Act passed in 1837, we learn that the office was at that time vacant and it further recites that it will not be necessary to fill any vacancy. Nor was it filled, and the reason is to be found in a previous Act passed in 1834, 4 Will. IV. cap. 4, which made a most important change in our judicial system. The preamble to that Act is as follows:

“Whereas by the laws now in force, it is made necessary that all causes shall be tried before two or more Judges of the Supreme Court, which has been found difficult and inconvenient in practice.” It was thereby enacted that after the passing of this Act it should be lawful for one Judge to preside at the trial of any and all issues as well in Criminal or in Civil causes. It was further enacted that the Supreme Court shall hereafter be held in the several counties and districts of this province before one Judge of the said Court in the same manner as the same has been heretofore held before two Judges of the said Court.”



But a further and more sweeping change in the Courts was made in the year 1841, 4 Vict. cap. 3. It was entitled "An Act to improve the administration of the Law and to reduce the number of Courts of Justice, and to diminish the expense of the Judiciary therein." By this Act the Inferior Court of Common Pleas was abolished, and its whole business and jurisdiction handed over to the Supreme Court because of the great delays and other injurious consequences in having the two Courts. Terms of the Supreme Court were made more frequent in the different counties; the office of Associate Circuit Court Judge, which had been vacant for some years, was done away with, and provision made to add one more Judge to the Supreme Court, thus, with the Chief Justice, bringing the number up to five. This additional Judgeship was bestowed upon Thomas Chandler Haliburton, popularly known as "Sam Slick," who had been one of the Judges of the Inferior Court of Common Pleas.

By the same Statute, power for the first time was conferred upon the Judges of the Supreme Court "to make and frame such rules and orders for regulating the practice thereof as shall appear to them necessary and proper to simplify the proceedings in suits in said Courts, and to prevent delay, and lessen the expense of such proceedings."

The Supreme Court Bench continued to be made up of the Chief Justice and four Puisne Judges until after the Confederation of the Provinces. The pressure of business again becoming too great for that number to dispose of it, a statute was passed in 1870 authorizing the appointment of two more Judges, thus increasing the number to seven, at which it remains at the present time. Such, in brief, is the history of our Supreme Court and the extension of its jurisdiction over the whole province of Nova Scotia, including the Island of Cape Breton, the gradual evolution of the Circuits in the different counties, and the increase of the Judiciary in compliance with the demands of public business. The times and places for holding the Circuit Court have been changed at different periods to suit the requirements of the Province, but in these changes we have no particular interest. The full Bench, by which I mean all the Judges, sat in banco only to hear such legal questions and applications for new

trials and other business as properly came up to them by way of appeal. In this way all the legal business of the province was tried and disposed of before the one Court until the year 1875, when County Courts were established with limited jurisdiction, and resident Judges in the districts for which they were appointed.

One other statute passed in the session of 1849 demands our attention. It is probably unknown to the present generation, except members of the Bar, that up to this time the Chief Justice and Judges received in addition to their incomes, in fact as part of them, fees and perquisites in all the suits brought in the Court, which must necessarily have seriously added to the costs of suitors. By 12 Vict. cap. 1, passed in 1849, entitled an Act for transferring the Crown Revenues of Nova Scotia and providing for the civil list thereof, after reciting that, "whereas it is intended that the salaries allowed to the Chief Justice and assistant justices of the Supreme Court shall be in full of all fees, perquisites, and emoluments whatsoever, save and except the travelling fees allowed by law: It is therefore enacted that it shall not be lawful for the Chief Justice, or any assistant or Puisne Justice of the Supreme Court to take or receive, or for the Prothonotary or any other officer for or on behalf of the said Chief Justice or any such assistant, or Puisne Justice, to demand, take or receive any fee, perquisite or emolument whatsoever for or in respect of the issuing, endorsing or making of any writ or filing any declaration or entry of any cause, or of the trial of any cause or of the signing of any judgment, or taxing any bill of costs, or for or in respect of any other proceedings had in any cause in the said Supreme Courts, but thereafter the demanding, or taking of any such fee, perquisite, or emolument shall absolutely cease, and determine; Provided always that such Chief Justice, or assistant or Puisne Justice shall receive the travelling fees allowed or which may hereafter be allowed."

I think all will admit that no wiser piece of legislation in reference to the Judicial office was ever placed upon our Statute Books.

But I must stop here, as it were, in the very midst of my subject, which even another paper of equal length would by no means exhaust.

I have left almost untouched the history of the Court of Common Pleas. I have not even mentioned some of the most important Courts which have in the past shared—many of which now share in transacting the judicial business of the country, such as the Court of Chancery and some of the distinguished Masters of the Rolls who presided therein; the Court of Probate, which deals with wills and administration of Estates; the Court of Error and Appeals; the Court of Marriage and Divorce; the Court of Escheat; the Court for the trial of Piracies, and the Court of the Vice-Admiralty. Connected with several of these Courts there is much interesting and useful information to be found in our ancient records. I have said nothing of the barristers and solicitors—many of them distinguished in their professional and political career, who have adorned with learning and eloquence our halls of justice and our Legislative Assemblies. I have made but slight reference to the many eminent Judges who have worthily presided in our Courts, and taken such a prominent and useful part in moulding and settling on sure foundations the laws under which we live. All such interesting information must be reserved for a future time, or for the research of some other investigator, who will find in our musty records ample material to justify the labour it will involve. I cannot lay claim to anything original in these pages which, as stated in the outset, were simply intended to set forth in connected and historical order the sources and foundations of our Courts of Justice, which have administered from the beginning and do now administer the law of this Province—those Courts which are bound to uphold and guard with jealous care the rights and liberties which we British subjects have inherited as our birthright, and are entitled to enjoy as our most cherished possession.

CHARLES J. TOWNSEND.

## EDITORIAL REVIEW.

**Sir John Boyd.**

The honour of Knighthood has been, for the first time, bestowed upon the Chancellor of Ontario. Sir John Alexander Boyd will wear his new adornment gracefully, no one can doubt.

**June.**

Justices are sitting  
In the month of June,  
And the long vacation  
Can't be here too soon.

Time is dull and heavy,  
Does not seem to flit:  
Till the long vacation  
Justices must sit.

The dreary, drowsy dronings  
Arising from the Bar  
Can scarcely pass for arguments,  
Whatever else they are.

And the judgments dropping  
Slowly from the Bench,  
Give one side an ecstasy—  
T'other one a wrench.

But the law you're getting  
When the weather's hot  
Is what you might expect  
For a penny in the slot.

O! but time is heavy  
In the month of June,  
And the long vacation  
Can't be here too soon.

## BOOK REVIEW.

*Mayne's Treatise on Damages*, 6th ed., by JOHN D. MAYNE, of the Inner Temple, Barrister-at-Law, and LUMLEY SMITH, Q.C., Judge of the Westminster County Court. London: Stevens and Haynes. 1899.

The first edition of this standard text-book appeared in 1856. Since that time many changes in the conditions of life and in statute law and numerous judicial decisions have widened the subject and rendered further editions necessary, all of which have maintained the authoritative character of the treatise and preserved its clear and concise style. The present edition continues the work down to 1899, and embodies all the English and Irish cases which have appeared since the last edition in 1894. The index is well prepared and full. A time-saving feature is the reference given by use of bold type in the table of cases to the page of the treatise at which the facts of any case are set out, the citations appearing in ordinary type. The mechanical execution is worthy of the high reputation of the text, and the nisi prius practitioner will find the book an invaluable aid.

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## CORRESPONDENCE.

**Chattel Mortgage Renewals.**

*To the Editor of the CANADIAN LAW TIMES.*

Sir,—The correspondence recently published by you on the subject of chattel mortgages has suggested to me the pointing out, through your columns, of a curious defect in the law regarding renewals.

By section 18 of the Chattel Mortgage Act, a mortgage ceases to be valid “against subsequent purchases and mortgagees,” if not renewed before the expiry of one year from the filing. It was held in *Hodgins v. Johnston*, 5 A. R. 449, that the word “subsequent” applied only to purchasers and mortgagees becoming such after the time for renewal had expired.

The draughtsman who prepared what is now section 21 of the Act, providing for further renewals, by some oversight no doubt, omitted the word “subsequent” before the words “purchasers and mortgagees” in that section. The apparent result is that while a purchaser or a mortgagee who becomes such during the first year of the currency of the mortgage, cannot take advantage of the non-renewal at the end of that year, yet, if the mortgage be then renewed, but not again renewed at the end of the second year, it becomes void as against him. I cannot believe that it was intended to place a mortgagee who renewed his mortgage the first time, but neglected to renew it the second time, in a worse position than if he had neglected to renew it at all, though this is the apparent result, as the law now stands.

In the recent case of *Heaton v. Flood*, 29 O. R. 87, the chattel mortgage had been renewed several times, and it therefore came under section 21, but Meredith, C.J., in discussing *Hodgins v. Johnston*, does not appear to have noticed the difference between the two sections. The judgment in *Heaton v. Flood* did not, however, turn upon this point.

M. J. GORMAN.

Ottawa.

# THE CANADIAN LAW TIMES.

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JULY, 1899.

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## NOTICE OF ACTION?

TO the placid practitioner the present state of the law on this subject is grievous; to the nervous it is also irritating. A relic of the past: how many otherwise good actions at law have been shattered by the plea of its absence or insufficiency, and how often has justice (in its vulgar meaning) been denied the litigant by reason of the mistake or misapprehension of his solicitor! Who is there has assurance sufficient to advise with certainty on all cases when it is requisite? Why should the Court of Appeal hold that a constable acting under a misconception of his powers should not have it (*a*), while a magistrate also acting under a misconception is entitled to it? (*b*) It can hardly be doubted that actual belief existed in the mind of the defendant in each of these cases as to his right, and that he was doing nothing but his duty. Each was wrong in his law, but why is one to be deprived of the technical benefit conferred by the statute (*c*), and the other to escape by hiding in its ingenious folds? Can it be said to be a question of degree which accounts for the difference in these cases? Is there anything more shocking to the mind in the arrest by a constable of a person who, taking refuge in a trick, tauntingly assumes to break the law—especially

(*a*) *Kelly v. Archibald*, 22 A. R. 522.

(*b*) *Sinden v. Brown*, 17 A. R. 173.

(*c*) Act to protect Justices of the Peace and others from Vexatious Actions, R. S. O. cap. 88.

when it is reasonable to suppose the plaintiff invited arrest (*d*), than where a magistrate metes out illegal imprisonment for non-payment of a fine, the payment of which would be to the indirect personal advantage of the magistrate? (*e*) Do these decisions mean that a distinction is to be drawn between the law's favour to a magistrate and that to his more humble coadjutor and feeder, the constable? If so, should there not be a protest, because unfortunately the "great unpaid" differ here somewhat from those in the old country in that they are frequently persons of small means and depend for a living largely upon the costs of hearing and conviction, and indirectly upon the total amount of fines collected by the municipality in the year. And many a rural magistrate has been known as much a pursuer as arbiter.

But then a poundkeeper has been held entitled to notice of action (*f*), while a sheriff has not (*g*), (but now see 62 Vict. cap. 7): so that it cannot be said that the favour is all on the side of the more important office. But whatever the reason underlying the cases mentioned, it is obvious that either their inconsistency or their differentiation makes the law doubtful. Here, then, are briefly considered the statutes and some of the cases; confining the latter to actions against public officers, and not troubling with notice required by the Workmen's Compensation Act and other statutes.

The Ontario Act, first passed in 1851, was taken from the Imperial Act 11 & 12 Vict. cap. 44, which is an amplification of the former Act 24 Geo. II. cap. 44, and has lately been so perforated (*h*) as to yield but little shelter to the defendant officer. The subsequent Ontario enactments and consolidations made it clear that the Act should extend to all classes of public officers, but the legislation of 1851 has substantially remained unaltered to this day.

The cases generally speaking are confined to two points: I. When notice is necessary. II. The sufficiency of the notice.

(*d*) *Kelly v. Archibald*.

(*e*) *Sinden v. Brown*.

(*f*) *Davis v. Williams*, 13 C. P. 365.

(*g*) *Creighton v. Sweetland*, 18 P. R. 180 (semble).

(*h*) The Public Authorities Protection Act, 1893.



I. The honest belief of the defendant that he was justified in acting has been held to be sufficient to make notice a necessity (i). This is founded on *Roberts v. Orchard* (j), which, however, though not impeached, is explained by *Leete v. Harte* (k) "as meaning not that the defendant merely dreamed of a certain state of facts without any grounds for his impression, but that some facts must exist which might give rise to an honest belief on his part that such a state of facts existed as would have justified his actions." See also *Bond v. Conmee* (l). That is to say an officer must honestly and reasonably believe he had jurisdiction. But the inconsistency between *Kelly v. Archibald* and *Sinden v. Brown* may be again referred to, as leaving us in doubt whether this really is the law, and we can only hope for a decision which will set the matter at rest.

And, it may be asked, is it wise that it should be left to the jury to find on belief in a state of facts, to determine the reasonableness or unreasonableness of which really requires learning in the law? Because, if there is a doubt as to what the law is, it must follow that honesty and reasonableness of belief of the existence of jurisdiction must be impossible to determine.

In *Scott v. Reburn* (m) the defendant acted on his supposition of a law that he could arrest three young ladies on the statement of a third person that another person, who lost her purse, suspected them of theft, and threatened to send them to the station in the patrol waggon, even after the loser had repudiated any assertion of their guilt or even suspicion of it. Why should the jury be asked to pass on these facts and their legal inference so as to determine whether the defendant had a reasonable belief in a supposed law which was no law, and thus obtain the technical benefit of the statute? Under such circumstances, instead of being intelligent and well versed in their duties and thus better

(i) *Scott v. Reburn*, 25 O. R. 450.

(j) 2 H. & C. 774.

(k) L. R. 3 C. P. 322.

(l) 16 A. R. 411.

(m) 25 O. R. 450.

public servants, would it not be more to the personal advantage of the officers to feign ignorance and honest stupidity. In *McKay v. Cummings* (*n*) the Court, on a general view of the defendant's conduct as a constable, held that he could not have had a reasonable belief that his duty as constable required him to arrest the plaintiff, and therefore was not entitled to notice. In this case the opinion of the jury was disregarded, and so it differs from *Scott v. Reburn*, where the jury also found "honest belief" in the defendant, and also from nearly all other cases tried in Ontario, where Judges prefer to have questions of fact answered by the jury, and decide accordingly. Although eventually the jury must give a general verdict (*o*).

Public authorities are not entitled to notice where the action is not for "acts done" by them. For instance, in an action for negligence in the obstruction of a road (*p*), or against a registrar for omission (*q*), or for slander (*r*).

After much doubt and diversity of opinion, it was held that a municipal corporation is not entitled to the notice: *Hodgins v. Bruce* (*s*), and *McCarthy v. Township of Vespra* (*t*); but a tax collector is: *Howard v. Herrington* (*u*); and members of a board of license commissioners (*v*).

II. What is necessary in the notice. *Kelly v. Barton* (*w*) did much to clear this point. The notices of action in that case were revised by two of the most eminent counsel, but one had to be abandoned at the trial, and the other was held insufficient; which would shew the amount of uncertainty which existed. Since that case it may be safe to say that the notice in stating the cause of action "clearly and explicitly" must allege that the act was done "maliciously" as well

(*n*) 6 O. R. 400.

(*o*) *Gordon v. Denison*, 22 A. R. 315.

(*p*) *McDonald v. Dickenson*, 25 O. R. 45, 21 A. R. 485.

(*q*) *Harrison v. Brega*, 20 U. C. R. 324.

(*r*) *Hanes v. Burnham*, 23 A. R. 90.

(*s*) 3 E. & A. 169.

(*t*) 16 P. R. 416.

(*u*) 20 A. R. 175.

(*v*) *Leeson v. Board of License Commissioners of the County of Dufferin*, 19 O. R. 67.

(*w*) 26 O. R. 608.

as without any "reasonable and probable cause:" *Davis v. Williams* (x); *Howell v. Armour* (y). The time and place of the act complained of must be set out: *Langford v. Kirkpatrick* (z); but in that case Moss, C.J.A., said the disposition of the Court is to exact no more than reasonable certainty, and that the test of the sufficiency of the statement of time and place is whether the defendant could have been misled. As a deduction from the report of *Kelly v. Barton*, it may also be said that the notice must be given by each plaintiff separately, and not by all together, and not in the alternative.

Altogether the law and practice are in rather a battered condition, and one's advice to the practitioner would be to give a notice even in the most doubtful cases. Let us hope for clarifying legislation, if such a thing is possible nowadays, or some comprehensive decision which will review all the decisions, of which there are quite too many to refer to in this short and meagre effort.

H. M. MOWAT.

(x) 13 C. P. 365.

(y) 7 O. R. 363.

(z) 2 A. R. 513.

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## ACTIO PERSONALIS CUM PERSONA MORITUR.

*(Continued.)*

Other qualifications in respect to contracts relating to land exist, and furnish a theme for vast and varied discussion. Thus in the case of a covenant running with the land where a formal breach has taken place in the testator's lifetime, but the substantial damage has risen since his death, the real and not the personal representative is the proper plaintiff; and the opposite rule obtains in the case of a covenant not running with the land and not intended to be limited by the life of the covenantee. This doctrine is plainly and elaborately set out in the luminous judgment of Lord Abinger in *Raymond v. Fitch* (g). The learned Baron there says: "The personal representative may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants and indeed all contracts with the testator broken in his lifetime; and the reason appears to be that these are choses in action and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. And this right does not depend on the equity of the statute 4 Edw. III. cap. 7, but is a common law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's lifetime. The maxim, *actio personalis cum persona moritur*, is not applied in the older authorities to causes of action on contracts, but to those in tort which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person and die with the person, except where the remedy is given to the personal representative by the statute law. . . . The rule that the executor may be sued upon every covenant which his testator has broken in his lifetime, has been directly qualified by the decisions in the two cases of *Kingdon v. Nottle* (h),

(g) 2 C. M. &amp; R. 596.

(h) 1 M. &amp; S. 355; 4 M. &amp; S. 53.

and *King v. Jones* (i), affirmed in error, in which case it was held that where there "are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative and not the personal is the proper plaintiff. These cases go no further, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral and does not run with the land; for the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor. It is a security by specialty given by the lessee to the lessor not to commit such a trespass during the lease which may continue beyond the lessor's life. For the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grow could not sue; the executor would be the proper party, as the covenant is collateral and intended not to be limited by the life of the covenantee; and if he could not sue, no one could. It is equally clear that the heir or devisee could not sue for a breach of the covenant in the time of the ancestor or devisor, and the executor therefore must sue, or all remedy is lost."

The general rule referred to in the judgment whereby the personal representative is entitled to sue on all covenants of a covenantee broken in his lifetime appeared at a very early period in the history of our law. One of the oldest cases which enunciated it is that of *Lucy v. Levington* (j), decided in the middle part of the reign of Charles II. The text of the report, omitting the unimportant parts, is as follows: "Covenant and declare that Levington sold to Luke Lucy, the plaintiff's testator, certain lands, and covenanted with him, his heirs and assigns, that he should enjoy the same against him and Sir Peter Vanlore, their heirs and assigns and all claiming under them; and assigns for breach that Croke, claiming under Vanlore, ejected him . . . And for the defendant it was argued that the covenant was

(i) 5 Taunt. 518.

(j) 2 Levinz 86.

with Lucy, his heirs and assigns, touching an estate of inheritance; therefore the action ought to be brought by the heir or assignee, whose loss it is, and not the executor. To which it was answered and resolved by the Court, that the eviction being to the testator, he cannot have an heir or assignee to this land; and so the damages belong to the executors, though not named in the covenant, for they represent the person of the testator."

The law on this subject as laid down by Lord Abinger in *Raymond v. Fitch*, supra, shortly after its statement, received the approbation and commendation of not less an authority that Chief Baron Pollock, whose name was as a shining light in the firmament of English law, and even at this day suffers no diminution. Speaking in *Ricketts v. Weaver* (*k*), the learned Judge says: "That case (*Raymond v. Fitch*) is an authority directly in point and ought not to be shaken. The result of that case is, that unless it be a covenant on which the heir alone can sue . . . for breach of the covenant in the lifetime of the lessor, the executor can sue, unless it be a mere personal contract, in which the rule applies that *actio personalis moritur cum persona*. The breach of covenant is the damage; if the executor be not the proper person to sue, the action cannot be brought by anyone."

When, however, a right of action is once vested in a testator, even if it is founded on a contract which is purely personal, the representative may sue on it. In *Stubbs v. The Holywell Railway Co.* (*l*), the defendants employed William Stubbs as consulting engineer for 15 months to complete certain works. He was to be paid £500 for his services in equal quarterly instalments; before the work was finished and whilst two quarterly instalments which were due to him were unpaid, he died. Held, that his personal representatives were entitled to recover them.

The rule is further limited in those cases where the damage occasioned by the breach of the contract consists entirely in the personal suffering of the deceased without any injury to his personal estate. Lord Ellenborough states this to be

(*k*) 12 M. & W. at p. 723.

(*l*) L. R. 2 Ex. 311.

the law in the celebrated case of *Chamberlain v. Williamson* (*m*). That learned Judge there says: "This is a motion in arrest of judgment in an action brought by the plaintiff as administrator for breach of promise of marriage made to the intestate by the defendant. The declaration did not contain any allegation of special damage. . . . The action is novel in its kind, and not any one instance was cited or suggested in the argument of its having been maintained, nor have we been able to discover any by our own researches and inquiries, and yet frequent occasions must have occurred for bringing such an action. The general rule of law is *actio personalis cum persona moritur*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where these wrongs operate to the temporal injury of the personal estate. But in that case the special damage ought to be stated on the record; otherwise the Court cannot intend it. . . . All injuries affecting the life or health of the deceased; all such as arise out of the unskilfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not, however, aware of any attempt on the part of the executor or administrator to maintain an action in any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. . . . Loss of marriage may, under some circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation the Court cannot intend it. On the ground, therefore, that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact shown to be privy, we are of opinion that, in the absence of any authorities, this administrator cannot maintain this action."

The converse case arose in *Finlay v. Chirney* (*n*), where an action for breach of promise of marriage was brought

(*m*) 8 M. & S. at p. 414.

(*n*) 20 Q. B. D. 494 (1888).

against the personal representative of the promisor, and a perusal of the judgment in that case will well repay the reader, as it shows the extreme reluctance of the Courts to countenance the action, by their imposing an almost impossible condition to its success, viz., the alleging and proving special damage. The defendants in that case were the executors of one Chirney and were sued in respect of a breach of promise of marriage committed by their testator during his lifetime. The plaintiff, a widow, was housekeeper to the testator, and was seduced by him under a promise of marriage, a child being born in August, 1884; in April, 1886, Chirney died. At the trial the plaintiff was nonsuited upon the ground that there was no corroboration of the promise, no other points being taken by the defendants. The plaintiff moved before a Divisional Court to set aside the nonsuit, when the objection was taken on behalf of the defendants that an action for breach of promise of marriage would not lie against the executors of a deceased promisor; but no judgment was given on that point, the Court being of opinion that the proper course was to set the cause down for a new trial. The defendants appealed. The pleadings contained no allegation that the plaintiff had suffered any special damage by reason of the breach of promise, but the Divisional Court gave leave to the plaintiff to amend the statement of claim in that respect, and to deliver particulars of the special damage to the defendants. By special leave of the Court of Appeal these particulars, verified by affidavit of the plaintiff, were used during the argument before their Lordships. Per Lord Esher, M.R., at p. 457: "Upon the first question I entertain no doubt whatever; the authority of English law is overwhelming to the effect that no action for breach of promise can be brought by executors or will lie against them. The authority for this proposition consists in the fact that in the case of *Chamberlain v. Williamson* (o) it was decided that such an action would not lie, at least at the suit of an administrator, and in the additional fact that there is no case to be found in the books where such an action has been maintained either by executors as plaintiffs or against

(o) 2 M. & S. 408.



them as defendants, and this in spite of the fact that circumstances must frequently have arisen which would invite a decision of the question. And, besides authority, there is the principle expressed in the maxim *actio personalis cum persona moritur*. . . . An action for breach of promise of marriage is strictly personal, and that although in form it is an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff. . . . But in the only English case on the subject, that of *Chamberlain v. Williamson*, there is an exception suggested to this rule which is expressed in the words, 'except there be special damage,' and on looking at the American cases, I find that they say the same thing. I know, however, of no case in which special damage has been laid and the action has been maintained, and . . . indeed I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie. . . . I entertain no doubt whatever that, even if the action will lie upon proof of special damage, it must be a claim for the special damage only. . . . The damage to be considered must be a damage affecting the property of the plaintiff, and for that only can the action be brought. What is the kind of special damage that can exist under such circumstances? I think it can only exist in cases where the plaintiff can show that, besides the promise to marry, there was at the time of the making of the contract another promise affecting the personal property of the one party or the other. . . . I think therefore that this action will not lie without special damage, and that if special damage be proved, it will not lie for anything that is not special damage. If there be special damage an action will lie for it, and the cause of action will still be for breach of promise of marriage, but the action will lie only for that special damage, whether the damage arises by reason of an express promise which was part of the contract to marry, or whether circumstances existed at the time of the contract which show that such special damage was then within the contemplation of the parties."

Per Bowen and Fry, L.JJ., at p. 506: "The decision in *Chamberlain v. Williamson* shows at all events that the Courts of this country will, even though an action for

breach of promise be an action arising out of contract, apply the general principles of the maxim 'actio personalis cum persona moritur' to so much of the damages as are a remedy for mere personal wrong, and will allow so much of the remedy to survive as seems to belong to the ordinary category of actions ex contractu. . . . Such damages only ought to be left as represent compensation for a temporal and measurable loss flowing directly from the breach or within the contemplation of both parties at the date of the promise, and that in an action against executors such a temporal loss, if it is alleged, must be tested according to the rules as to remoteness as applied to the special facts of the case."

The same principle as to non-survival of actions brought to recover damages in cases where personal suffering only is complained of was applied in an action for seduction in the Common Pleas in Upper Canada in the case of *Ball v. Goodman* (p). The judgment of Draper, C.J., is learned and lengthy, but it proceeds on the law as laid down by Lord Ellenborough in *Chamberlain v. Williamson*, supra. Years after, the law was declared in *Udy v. Stewart* (q) to have undergone no change. In respect of that same action Cameron, C.J., in the latter case at p. 602 says: "There is no doubt since the case of *Ball v. Goodman* . . . that the action of seduction does not survive to the plaintiff's representatives. It is a purely personal action for a wrong not affecting the corpus of the plaintiff's estate, and comes within the maxim 'actio personalis moritur cum persona.'"

It has been held in England, but latterly with great doubt and hesitation, that where the personal estate of the deceased was impaired in his lifetime by the breach of contract, his representatives after his death might recover damages consequent on such personal injury, as medical expenses and loss occasioned by his inability to attend to business; but it is otherwise when the damage results from neglect of duty and is founded in tort. Three cases decide this, the first in point of time being *Bradshaw v. The Lancashire and Yorkshire*

(p) 10 C. P. 174.

(q) 10 O. R. 591.

Railway Company (*r*). There the female plaintiff was the executrix of the testator, and he, while travelling on the defendants' railway, had been injured by a railway accident; he ultimately died from the injuries received, and it was not disputed that he had incurred expenses for medical attendance amounting to £40, and that the loss occasioned to his estate in respect of his being unable to attend to his business previous to his death, was £160. The jury found for the plaintiff. It was contended for the defendants that the maxim 'actio personalis moritur cum persona' applied, and that the action was not maintainable. They contended that the only remedy given to the representatives of the deceased was under Lord Campbell's Act. It was urged that at common law the action for personal injuries dies with the person, and that damages in respect of expenses, etc., are merely subsidiary to the personal injuries, the right of action for which is gone. They contended that with the exception of one case—*Potter v. The Metropolitan District Railway Company* (*s*), which was clearly distinguishable,—there was no authority for establishing an independent cause of action in respect to loss to the personal estate. But the Court overruled all these contentions, and held the action quite maintainable. In delivering judgment Mr. Justice Grove said: "I do not see that that follows as a necessary or logical consequence"—referring to the argument that inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also—"The two sorts of damages are separable—the one is the pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured and as such dies with the person. I do not see . . . why the damage to the estate that would clearly be recoverable if the injured party lived, should be less recoverable because of his death."

What the consequences of so strained a construction of the rule is will be seen from another case to which I shall now refer, in which the Court, although feeling bound by the decision in *Bradshaw's* case, expressed the greatest reluctance

(*r*) L. R. 10 C. P. 189.

(*s*) 30 L. T. N. S. 765.

in being obliged to follow it. This case (*t*) arose out of the following facts: The plaintiff was administratrix of her husband, who had been a passenger on the defendants' line of railway, and was injured owing to the negligence of their servants, from which injuries he eventually died. In this action the plaintiff claimed damages for injury to the personal estate and effects of the deceased. The defendants pleaded that after the death of the deceased, the plaintiff as his administratrix, for the benefit of herself as his wife, and of his children, sued the defendants in respect of the injury caused to them by his death, and recovered damages, and also denied specifically all allegations of the plaintiff of the injury to the deceased and the damages arising from it. The plaintiff replied that the defendants were estopped from denying the facts relating to the accident, as in the previous action they had pleaded 'not guilty,' and that the plaintiff was not received by them as a passenger, and that these issues had been found by the jury in the plaintiff's favour. The Court held, citing the *Duchess of Kingston's Case* (*u*), that no estoppel arose, and that the defendants were at liberty to traverse the allegations. Doubts were expressed by the Court as to the propriety of such an action as this, but *Bradshaw's Case*, *supra*, was binding upon them. "With the single exception, so far as I am aware," said Mellor, J., "of the case in the Common Pleas—*Bradshaw v. Lancashire and Yorkshire Railway Company*—there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action;" and Mr. Justice Quain remarked that as to the action itself, he yielded to the authority of the Common Pleas without assenting to it.

But, as I have said, the law is otherwise when these consequential damages, so called, arise from a neglect of duty and are founded in tort. *Pulling v. Great Eastern Railway Company* (*v*) is an undisputed authority for this position. The facts of that case were as follows: The plaintiff as administratrix of her late husband, by the leave of the Court, continued this action, which was commenced by him in his lifetime. Whilst crossing the defendants' railway at a level

(*t*) *Legott v. The Great Northern Railway Company*, 1 Q. B. D. 597.

(*u*) 8 Smith L. C., 7th ed., p. 798.

(*v*) 9 Q. B. D. 110.

crossing, he was through their negligence run over by an engine, and sustained personal injuries which prevented him following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value. It was held that the plaintiff could not sue in respect of damages to the intestate's estate arising, as above mentioned, from the tortious injury to the intestate's person, and that the action was therefore not maintainable. Per Denman, J., at pp. 111-112: "I think that our judgment must be in favour of the demurrer. This action is clearly an action of tort, the cause of action alleged being the negligent management by the defendant of their railway and engine, whereby the original plaintiff sustained personal injury. . . . I do not think we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim 'actio personalis moritur cum persona.' To a certain extent that doctrine has been qualified. Under the Statute of Edward III. it has in many cases been held that when the cause of action, whatever its form may be, is in respect of a tortious impairment of the personal estate, such action may be maintained by the personal representative. But none of the authorities goes so far as to say that, where the cause of action is in substance an injury to the person, the personal representatives can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. . . . There is no decision which supports the proposition that, because, in consequence of such injury, the person injured is put to expense, the case is brought within the category of cases to which the Statute of Edward III. applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses."

In Ontario the same principle was applied in a case that existed under somewhat similar circumstances (*w*). Hagarty, C.J., at p. 396, says: "I am of opinion that the present action died with Milloy, and that no suggestion can

(*w*) *Cameron v. Milloy*, 22 C. P. 331.

be properly entered on this record. It seems to be a case for a purely personal injury . . . and is quite distinct from a case in which an injury was done to the plaintiff's property, so as to charge the assets of the deceased."

All the refined and subtle learning on this head is however now at rest in that Province by a statute (x). The case of *Mason v. Town of Peterborough* (y), decided on that statute, practically abrogates the maxim, excepting of course the limitations imposed by that Act. Per Osler, J.A., at p. 686: "This enactment embraces all former statutory changes made in the ancient rule, the principal alteration actually introduced by it being that causes of action for torts where the injury done is of a personal nature, now survive to the executors, as well as those for injuries to testator's real and personal estate."

There are certain actions, called for want of a better name, *ex-quasi contractu* wherein, if the representative can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he can sustain an action at the common law to recover such damages, although the action is in some respects founded in tort. In *Knight v. Quarles* (z) the plaintiff as administrator declared in *assumpsit* that the defendant for certain fees to be paid him by the intestate undertook as attorney to investigate and see that a title about to be conveyed to the intestate was a good one. Breach, that he omitted to do so, and that the intestate in consequence took an insufficient title, whereby his personal estate was injured. The defendant having demurred, the demurrer was overruled. At p. 104 of the report it is said: "The Court stopped Frere, Serjt., who was to have argued for the plaintiff, expressing an unanimous opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the intestate, and an injury to his personal property, the truth of which allegations were admitted by the demurrer; that it made no difference in this case whether the promise were express or implied, the whole

(x) R. S. O. (1897) cap. 129, sec. 10.

(y) 20 A. R. 683.

(z) 8 B. & B. 10.

transaction resting on a contract; that though perhaps the intestate might have brought case or assumpsit at his election, assumpsit being the only remedy for the administrator, it was very necessary the action should be maintained or the defendant might escape out of the consequences of his misconduct and the intestate's estate suffer an irreparable injury. . . . That it could not be pretended that the contract of the defendant in this case was a contract running with the land; but if it were so, an action would lie by the administrator for a breach and damage incurred in the lifetime of the testator."

This principle of liability was extended to bind the estate of a deceased person, whose business partner, within the scope of the partnership business, caused damage to the estate of a testator by breach of an implied obligation or undertaking (a). In the case noted a firm of solicitors—Messrs. Goodwin, Partidge, Williams, and Edwards—acted for one Henry Ernest, the owner of certain lands in England, who wished to mortgage them for £13,000, to one James Parkin and the Rev. Robert Govett, trustees under the marriage settlement of Mr. and Mrs. Hopgood. Williams, one of the partners of the mortgagor's solicitors, conducted the transaction and delivered to C. A. Govett, the mortgagees' solicitor, an abstract of the title of the mortgagor's lands, suppressing all reference to prior mortgages within his knowledge affecting part of the proposed security. The other partner, Goodwin, having died in 1859, Williams, one of the survivors, left England in 1861 in very embarrassed circumstances, after which the said C. A. Govett and one Hopgood, now new trustees of Mr. and Mrs. Hopgood, discovered the existence of two mortgages on their security in priority of their own, and then became first aware of the breach of duty of which Williams had been guilty in suppressing them from the abstract. This suit was instituted in 1861 by a creditor of Charles Goodwin for the administration of his estate, and in February, 1863, a claim was entered by C. A. Govett on behalf of himself and Hopgood in respect of the £13,000 mortgage. It was held that the estate of Goodwin was liable, inasmuch as the loss occurred by the default of the surviving partner within the

(a) *Sawyer v. Goodwin*, 36 L. J. Ch. 578.



scope of the partnership business. Per Stuart, V.-C., at p. 582: "Goodwin, however, died long before this claim was made. It was said in the argument that the remedy was in this case by a personal action, and that the rule '*actio personalis cum persona moritur*' must be considered to be applicable. . . . That is the principle at law, and it is that which the form of the pleadings and the system of procedure in Courts of law render intelligible. But it seems very plain to my mind that there may be cases in which the action is brought and the case stated as upon a wrong committed *ex delicto*, but in which, from the nature of the injury, the action might as well have been brought upon the footing of a contract. . . . If that view is correct, the death of Mr. Goodwin makes no difference. The liability is a partnership liability. It is a liability proceeding upon a neglect of that duty which upon an applied *assumpsit* he undertook to discharge. . . . The transaction in question was a partnership transaction done in the ordinary conduct of the partnership business. . . . The maxim '*actio personalis cum persona moritur*' does not apply."

That this doctrine is favoured by the Courts appears again from the case of *Smith v. Blyth (b)*. That was an action brought by Mr. Horace W. Smith against his co-trustee, Mr. Philip William Blyth, for contribution. It was met by a counterclaim on the part of Mr. Blyth against Mr. Smith, Mr. William F. Fladgate, and the legal personal representatives of Mr. William Mark Fladgate, alleging that the firm of Messrs. Fladgate, Smith, and Fladgate, acting as solicitors for the deceased P. W. Blyth, were guilty of negligence, and seeking relief upon that footing. Per Stirling, J., at p. 365: "I come therefore to the conclusion that Mr. Smith, having been guilty of negligence as solicitor to Mr. Philip William Blyth, cannot claim from him any contribution in respect of the liabilities imposed by the judgment in *Blyth v. Smith*. . . . It is, however, to be observed that Mr. Philip William Blyth seeks relief not only against Mr. Smith and William Francis Fladgate, but also against the representatives of Mr. William Mark Fladgate, and it may be right that I should express my views

(b) [1891] 1 Ch. 849.



on that part of the case. Now, if the claim of Mr. Philip William Blyth be considered to arise *ex delicto*, the maxim '*actio personalis cum persona moritur*' affords an answer on the part of the legal personal representatives of the deceased partner, Mr. William Mark Fladgate. The claim, however, may be regarded as arising *ex contractu* and as founded upon an implied promise on the part of the firm to exercise reasonable skill and care in the performance of their duties as solicitors of the plaintiff in the counterclaim. In my opinion, therefore, the legal personal representatives of Mr. William Mark Fladgate were properly made defendants to the counterclaim, and his estate is liable for the amount of damages which may be found due to Mr. Philip William Blyth."

The case of *Batthyany v. Walford* (c) further illustrates this extension of contractual survival. There the possessor of Austrian entailed estates died domiciled in, and left property in, England. By the law of Austria the possessor is under an obligation to hand over the property to the successor in as good a state as when he received it, and is liable for deterioration, whether voluntary or permissive, unless it occurs without any fault of his, and he is entitled to compensation for improvements made by him. The successor, Prince Edmund Batthyany Strattman, brought a creditor's action in England against the English executrix, in which it was admitted by the parties that there was some deterioration, and also that some improvements had been made. North, J., made a decree for administration, with liberty to the plaintiff to take proceedings, in the Courts of the countries in which the estates were situate, to establish the amount of his claim. On appeal, Cotton, L.J., thus delivered himself touching the point under consideration, at pp. 275, 278: "The plaintiff claimed as creditor, and the judgment directed accounts and inquiries in order to ascertain what, if anything, was due to the plaintiff, and then gave the ordinary directions in a creditor's decree for the administration of the estate. . . . As I understand the evidence, the claim according to the law of Austria is not in the nature of damages for default, but a claim under an obligation to

keep the property in as good condition as the late possessor found it, with liberty to excuse himself from making good the deficiency if he can show that it was not caused by any default of his own. That, in my opinion, is not a claim simply depending on tort, and does not come within the rule of 'actio personalis cum persona moritur.' It may be that it is a wrong which has produced the deterioration, but the claim, in my opinion, is one depending on the implied contract or obligation which, by the law of Austria, every possessor under a fidei commiss takes upon himself when he enters into possession."

The judgment of Jessel, M.R., in *New Sombrero Phosphate Co. v. Erlanger* (d) is also instructive on this point. At p. 117 that learned Judge says: "Now, Vilmet was an original member of the syndicate. He died after the suit was instituted, and his executors were made parties by amendment. It was contended on their behalf that, as this was in the nature of 'actio personalis cum persona moritur,' the executors could not be made liable after his death at all. But the answer to that is simply this; it is an action against partners. They are all jointly and severally liable for the acts of misfeasance committed by their managing partner. It is not a mere action for damages brought against the testator, but it is one to make his estate liable in common with his partners, and the action has no relation to those simpler actions which have been held to die with the person, according to a doctrine which certainly should not be extended in the present day so as to do injustice between the estate of a dead man and his living co-partners." (e)

In *Ramskill v. Edwards* (f) the principle is reiterated with great emphasis, precision, and desirable certainty. It was an action brought by Dr. J. S. Ramskill, who was formerly a director of the Imperial Union Accident Assurance Company, against, amongst others, Arthur Long, the administrator of George Long, a co-director, for contribution from him in respect of the sum of £1,300

(d) 5 Ch. D. 78.

(e) Affirmed on appeal: see 3 App. Cas. 1278.

(f) 31 Ch. D. 100.

which the plaintiff had been compelled to pay under a judgment which the company had recovered against him, with others, amongst whom was Long in his lifetime, for advancing moneys of the company which were never paid, as unauthorized. At p. 111 Pearson, J., thus expresses himself: "But Mr. Mulligan has contended that, inasmuch as he (i.e., Long,) is dead, his estate cannot now be made liable. It was undoubtedly a bold contention, and if it succeeded, the result would be that any defaulting trustee would have only to die, and his estate would cease to be liable for his misfeasance. Not only is there no authority for such a proposition, but it seems to me that it would be most pernicious to allow it (g).

*(To be Continued.)*

JOHN J. POWER.

(g) See also *Prior v. Hembrow*, 8 M. & W. at p. 888.

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## EDITORIAL REVIEW.

**Good Friday.**

The decision of a Divisional Court in *Foster v. The Toronto Railway Company*, in this number of the Occasional Notes, p. , is upon an academic point of some interest. The trial of the action before the Chief Justice of the Common Pleas and a jury was continued, counsel for both parties consenting and the jury desiring it, on Good Friday. The verdict being adverse to the plaintiff, he contended in the Divisional Court that the judgment founded on the trial and verdict was a nullity. The Chancellor, delivering the judgment of the Divisional Court, emphasizes the distinction between merely statutory holidays and *dies non juridici*, which have been often confused. "In this country," he says, "the only day on which no judicial act can validly be done is the Lord's Day or Sunday." "Christmas, Good Friday, and the like, are holidays by statute, but they are not on the same footing as to separateness from ordinary or secular work as the Lord's Day, nor are they regarded as religious occasions by a great part of the population." Sunday, it appears, is *dies non*, "as declared by early canons of the church, adopted or confirmed by the English Kings, and so incorporated into the common law, and as such introduced into this Province." An appeal to the early canons of the church will probably show that Good Friday and Christmas Day are on the same or a higher footing than Sunday as days of obligation. The exalting Sunday above other "holy days" is modern and of Puritan origin. It is, no doubt, sometimes convenient to continue a trial on Good Friday, and it has very often been done, as in this instance, by the consent of every one interested. The same readiness of acquiescence would not be found in counsel and jurymen, were Christmas the day to be sacrificed. The next step in advance may be to continue a trial on Sunday. The Chancellor's words, "nor are they

regarded as religious occasions by a great part of the population," would not be inapplicable to Sundays, *e.g.*, "Jews, hereticks, and infidels," to quote a petition which the Chief Justice, jurymen, and counsel might have heard had they not been otherwise engaged.

#### **Election Trials.**

The trials of petitions respecting the election of members of the Legislative Assembly for Ontario which have been going on through the Province for the last few weeks, arise out of bye-elections which were all, or nearly all, brought on by the unseating of members for bribery by agents at the general election. It is perhaps natural that when gross bribery has been shewn to have been practised in a particular district, the issue of the writ for a new election should be the signal for fresh onslaughts upon the virtue of the electors. Nay, it would seem that the purpose of a judicial inquiry into the validity of an election is to point out to the briber the exact spot where his golden bait will be most greedily swallowed. Well-informed persons assert that the same loose fish are hooked by one side or the other—often both—at all elections. The Rota Judges have just visited South Ontario, West Huron, and West Elgin, their previous visits to the same constituencies having taken place within the year, and it looks as if they might be back again before the snow flies. This would have a humorous aspect, if it were not so unspeakably degrading. Neither political party can afford to revile the other in this regard. But right-minded members of both would like to know where the money comes from which is so freely dispensed by generous strangers on dark nights. Voiding the election seems to be of no effect in preventing the repetition of the offence. The election law is rigorously administered by the Courts, but the penalty falls on the innocent instead of the guilty. The briber and the bribee should both be punished. The statute makes provision for prosecutions, but it seems to be a dead letter. Would it not be well for decent members of the community to be at some pains to mark the contempt they must feel for the miserable beings who accept bribes? It is very well to say that the bribers are chiefly at fault; but, under the bribery practice or procedure now in force, the bribers

are not easy to identify, and their operations are conducted far from their homes; while the poor wretches who are bribed are known to their neighbours, who, it is to be feared, to some extent condone their offences. Not long ago, at one of these trials, an old man got into the witness box and confessed that he had sold his own and his two sons' votes for \$15 to one side, and had afterwards taken \$5 from the other side. A spectator observed that this witness, after thus disclosing his deep disgrace, took a seat in the court room to enjoy the rest of the performance, and was promptly approached by a respectably dressed man, probably a neighbour, who shook him by the hand in a kindly way in the face of the crowd, with all the appearance of congratulating him on having disposed of his wares to such advantage. An incident such as this points a moral. If ordinary citizens, not professional preachers of law and morality, will take the trouble to shun their fellow-men who have lost their manhood in this way, as they would shun them were they guilty of nameless offences, it will not be necessary to devise a better election law—which, as matters stand, seems to be urgently needed.

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# THE CANADIAN LAW TIMES.

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## EXTRA-TERRITORIAL JURISDICTION.

**L**EGISLATION upon the subject-matter of procedure usually is founded upon the weightiest and most matured considerations of policy and reason. It is not undertaken by rash and untrained hands in precipitate obedience to popular clamour or imperative conditions sharply revealed. It is the product of highly specialized knowledge and conservative sympathies yielding up an outworn system to changes suggested by full years of close observation. It is seldom anomalous or arbitrary, but sustains a vital and interdependent connection with the general principles of jurisprudence. It can, therefore, ordinarily be dealt with upon the basis that it has not been conceived in defiance of fundamental legal rules, and that it can be supported by scientific considerations, and should be so construed. The provisions of the Common Law Procedure Act, 1852, repeated with some modification in Order XI, r. 1 (e), of the English Supreme Court Rules permitting service of writs of summons abroad, have been referred to by Prof. A. V. Dicey as an example of an excess of legislative authority (a), and as indefensible in principle (b). The justice of this criticism does not find support in the essentially technical character of the legislation, the precision of the language employed, and the carefully drawn exactness of its limitations. Nor is the criticism in accord with the views of other jurists. In *In re Busfield* (c) Chitty, J., referring to Order XI., says: "The rules embodied in this Order are founded on general

(a) 7 L. Q. Review 120.

(b) 8 L. Q. Review 36.

(c) 32 Ch. D. 124.

principles of jurisprudence, and in the framing of these rules the whole subject has obviously been reconsidered and attention has been directed to the views entertained by the Courts of Scotland and Ireland, and by foreign Governments, particularly that of Germany. The rules treat particular cases with care and precision, and define and limit the authority of the Court." In *Hart v. Herwig* (*d*) Mellish, L.J., says that the Common Law Procedure Act does not violate any rule of the comity of nations. A learned foreign commentator uses similar language to that of Chitty, J., saying: "We may assume that the English method of citing a non-resident alien defendant has been framed with great care, due regard having been paid to the fundamental rules of international law." The opposition of these views suggests an inquiry as to which is correct.

By the Common Law Procedure Act, 1852, ss. 18 and 19, it was provided that a writ of summons for service out of the jurisdiction upon a British subject could be issued where the cause of action arose in England, or was in respect of the breach of a contract made in England, and that where the defendant was not a British subject he should be served with notice of the writ instead of the writ itself. By Order XI., r. 1, of the English Supreme Court Rules it is provided that service out of the jurisdiction of a writ of summons may be allowed by the Court or a Judge whenever (*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction. By rule 6 of Order XI., when the defendant is neither a British subject, nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him. The criticism that this legislation is in excess of legislative authority obviously refers to the measure of authority to legislate extra-territorially allowed to the legislature by international law. If proceedings taken under the legislation will not be recognized under the rules of international law by foreign tribunals, it is incompetent legislation. The criticism that the legislation is indefensible in principle refers to the attitude of English Courts as exhibited in the

(*d*) L. R. 8 Ch. 864.



case of *Schibsby v. Westenholz* (e) in declining to enforce judgments obtained in foreign Courts under similar legislation. Some confusion of thought frequently arises by attributing to the legislation in question the character of extra-territorial legislation because of its provision for service abroad. It is extra-territorial legislation not by virtue of this, but because it confers jurisdiction to try actions against foreign subjects not present in England. The service of an English writ abroad may be said to be a breach of the comity of nations, as the doing of an act in another country inconsistent with the supremacy of the sovereign thereof, and could be criticized upon that ground, but if the cause of action on which it is issued is properly cognizable by an English Court, then it will not be complained of in the sense used in Prof. Dicey's criticism. If the procedure for citing the defendant was by publication in an English newspaper, it would be extra-territorial legislation equally with that part of the legislation in question providing for service abroad. Unless the power to try actions under the circumstances defined in the legislation is in excess of the authority of the legislature to confer, from the point of view of international law, the provision with respect to service is not beyond its competency. Prof. Dicey's criticism may, therefore, be taken to be directed to the jurisdiction given by the legislation to English Courts, rather than to the form of procedure to be followed preliminary to its exercise.

The contention just made is thus stated by Lord Westbury in *Cookney v. Anderson* (f): "If one sovereign causes process to be served in the territory of another, and summons a foreign subject to his Court of justice, it is in fact an invasion of sovereignty, and would be unjustifiable unless done with consent; which is assumed to be the fact, if it be done in a case where a foreign judgment would by international law be accepted as binding." It is also to be pointed out that Prof. Dicey's criticism must be limited to the portion of the legislation applicable to foreign as distinguished from British subjects resident abroad. The British legislature is free to enact legislation with respect to British

(e) L. R. 6 Q. B. 160.

(f) 1 DeG. J. & S. 380.

subjects, wherever resident, without protest from foreign nations, and such legislation is accepted by international law as binding upon such subjects in the Courts of foreign countries. In *Cookney v. Anderson* (*g*) Lord Westbury says: "The duty of yielding obedience to the law of his native country may follow the native subject of that country wherever he resides, for every nation has a right to bind its own natural-born subjects by its own laws in every place. Municipal law, therefore, may provide that judgments and decrees may be lawfully pronounced against natural-born subjects when absent abroad, and may also enact that they may be required to appear in the Courts of their native country, even whilst resident in the dominions of a foreign sovereign."

In *Schibsby v. Westenholz* (*h*) an action was brought upon a judgment obtained in a French Court against the defendant while absent from France, and it appeared that by the law of France a French subject or an alien resident in France may sue a foreigner living outside of France. Blackburn, J., in the course of his judgment, pointed out that if the defendant at the time of the judgment had been a French subject, he would be bound by the laws of France, and that the judgment would be enforceable against him in an English Court. See also the recent cases of *Sirdar Gurdyal Singh v. Rajah of Faridkote* (*i*) and *Attorney-General for New South Wales v. McLeod* (*j*). It will be noticed, however, that the legislation before us places British and foreign citizens upon the one footing, except that in the case of the latter a notice of the writ instead of the writ itself is to be served. While this circumstance does not involve the proposition that the legislation must be judged as to British subjects by the test of international law, it does support the argument, shortly to be made, that in framing this legislation the legislature was governed by fundamental considerations which, while not acknowledged in international law, justify the legislation in principle from the point of view of municipal law.

(*g*) 1 DeG. J. & S. 379.

(*h*) L. R. 6 Q. B. 160.

(*i*) [1894] A. C. 670.

(*j*) [1891] A. C. 458.

The general rule of universal acceptance as to the jurisdiction of Courts over absent defendants who owe no allegiance to the power conferring such jurisdiction, is that it must be exercised territorially, and is a corollary of the maxim *actor sequitur forum rei*, and which, as observed by the Earl of Selborne in *Sirdar Gurdyal Singh v. Rajah of Faridkote* (*k*), is rightly stated by Sir Robert Phillimore (*l*) to "lie at the root of all international and of most domestic jurisdiction." The rule is embodied in the common law of England, by which personal actions, whether in contract or tort, arising abroad, may be brought in England if the defendant can be served with process within the jurisdiction. This rule furnishes the test as to the validity of judgments in actions upon them before foreign tribunals, either English, American, or Continental.

In *Sirdar Gurdyal Singh v. Rajah of Faridkote* (*m*) the Earl of Selborne says: "All jurisdiction is properly territorial, and '*extra territorium jus dicenti, impune non paretur*.' Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who, when living, were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire), the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners, who owe no allegiance or obedience to the power which so legislates. In a personal action, to which none of these causes of jurisdiction applies, a decree pronounced in *absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by

(*k*) [1894] A. C. 683.

(*l*) *International Law*, vol. 4, s. 891.

(*m*) [1894] A. C. 683.

international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the forum by which it was pronounced. These are doctrines laid down by all the leading authorities on international law; among others by Story (*n*), and by Chancellor Kent (*o*), and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the locus solutionis. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to to do justice."

English Courts have repeatedly acted upon these principles in pronouncing upon the extra-territorial effect of foreign judgments, and have never been governed by considerations suggested by insular policy as distinguished from those held in common by all nations acknowledging international law. They were fully applied in the case in which they were expounded by the Earl of Selborne, and in *Schibsby v. Westminster* (*p*), and *Rousillon v. Rousillon* (*q*).

In the United States the same principles obtain. Wharton, s. 795, says: "If the practice lately established in England, giving the English Courts jurisdiction in all cases where contracts are made in England, though the defendant is out of the jurisdiction of the Court, is supposed to give extra-territorial force to judgments entered in England on such contracts, when the defendant is domiciled in a foreign land, and is served with process in such foreign land, then it is not to be reconciled with the principles of international law which English jurists themselves now accept. A contract may be accidentally executed in England, without England being in any sense its legal seat. It may be executed

(*n*) *Conflict of Laws*, 2nd. ed., ss. 546, 549, 553, 554, 556, 556.

(*o*) *Commentaries*, vol. 1, p. 284, note c, 10th ed.

(*p*) *L. R.* 6 Q. B. 160.

(*q*) 14 Ch. D. 351.

in England by two Prussians, for instance, and the subject-matter may be Prussian, and the place of performance Prussia. In this case the English law in no sense attaches to it. And the only way in which the English Courts could take jurisdiction of such contract, would be by voluntary submission of the parties. This, on the plaintiff's part, would be evidenced by institution of the suit; on the defendant's, by presence either personally or through attachable property. Without jurisdiction thus acquired, such a judgment can have no extra-territorial force. In the United States it has been expressly ruled by the Supreme Court that the judgment of an English Court, entered under the English practice, against a person in the United States, after a personal notice served on him in Baltimore, is without international validity," citing *Bischoff v. Wethered* (r).

As Prof. Dicey's criticism that the legislation we are considering is in excess of the authority of the British legislature must be taken to refer to its extra-territorial effect, there would seem to be no difficulty in pronouncing upon its accuracy, unless the rule as to territorial jurisdiction admits of qualification in favour of the class of cases to which the legislation is limited. The fact that a general jurisdiction over absent defendants is not given indicates a deference on the part of the Legislature to an authority outside of itself, whether it be the principles of the common law or international jurisprudence. A search, however, will be made in vain in international law to find that it allows extra-territorial effect to judgments obtained under the circumstances laid down in either the Common Law Procedure Act or in Order XI., r. I. (e).

In *Sirdar Gurdial Singh v. Rajah of Faridkote* (s) the Earl of Selborne had occasion to address himself to the following observation in the judgment of Sir Meredyth Plowden, delivered in the Chief Court of the Punjaub: "On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner, in respect of an obligation arising out of a contract made by the foreigner

(r) 9 Wall. 812.

(s) [1894] A. C. 684.

while resident in the State and to be fulfilled there, is not acting in contravention of the general practice or the principles of international law:" and said: "If this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. No authority, of any relevancy, was cited at their Lordships' bar to support it, except *Becquet v. Macarthy* (*t*), and a passage from the judgment delivered by Blackburn, J., in *Schibsby v. Westenholz* (*u*). Of *Becquet v. Macarthy* it was said by great authority in *Don v. Lippman* (*v*) that it 'had been supposed to go to the verge of the law;' and it was explained (as their Lordships think, correctly) on the ground that 'the defendant held a public office in the very colony in which he was originally sued.' He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a colonial government, it would, in their Lordships' opinion, have been wrongly decided. The words of Blackburn, J.'s, judgment in *Schibsby v. Westenholz*, which were relied upon, are these: 'If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued.' Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned Judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on

(*t*) 2 B. & Ad. 951.

(*u*) L. R. 6 Q. B. 155.

(*v*) 5 Cl. & F. 1.

the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. The question was not argued, and did not arise, in the case then before the Court; and, if this was what Blackburn, J., meant, their Lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in *Schibsby v. Westenholz*, Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the *forum loci contractûs*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied."

In view of the conclusive character of the views laid down in this judgment, and their complete antagonism to the position that the legislation before us rests upon general principles of jurisprudence as stated by Chitty, J., in the passage already quoted from *In re Busfield* (*w*), one is constrained to think that all this eminent jurist meant was that the legislation while territorially applied does not transcend the limits of legislative competency accorded by one country to another over foreign subjects residing beyond its borders. This construction of the passage would manifestly be in harmony with the considerations that must have been present to the mind of the legislature in framing the Common Law Procedure Act, 1852, as shown by the scrupulous exactness of the limitations of the jurisdiction there conferred, not merely in respect to foreign, but also to British subjects,

(w) 32 Ch. D. 124.



a class of persons over whom, as we have seen, the legislature could exercise plenary authority unless restrained by considerations of principle.

Our inquiry is therefore shifted from an examination of the extra-territorial validity, by the test of international law, of the Common Law Procedure Act, 1852, and Order XI., r. 1 (e), to an examination of the propriety of the legislation as municipal law from the point of view of principle. Nor is such an inquiry likely to be fruitless, for, in addition to the considerations just adumbrated, and while it is true, to paraphrase the language of Lord Herschell in *British South African Co. v. Companhia de Mocambique* (x) that the question what jurisdiction is conferred on the Courts of a country by its local laws cannot be determined by a reference to principles of international law, yet, where the jurisdiction relates to persons living out of the country, the principles which have found general acceptance amongst civilized nations as defining the limits of jurisdiction must have been of great weight with the legislature in framing such laws.

Taking up the common law of England, we find that while previous to the Common Law Procedure Act, 1852, the Courts had no power to issue process for service abroad, it was never made the test of the jurisdiction of the Courts that the defendant should be personally served with process within the jurisdiction. As stated in the Report of Commissioners on Pleading, 1851, pp. 5-7, the provisions of the Common Law Procedure Act allowing service abroad were but a substitution of the remedy by distringas and outlawry against a defendant resident out of the jurisdiction. As the learning upon this obsolete procedure is highly technical and involved, it cannot be more concisely explained than in the following reference to it by Brett, J., in *Jackson v. Spittall*, L. R. 5 C. P. 550: "A British subject resident abroad could not be served there with a writ of summons. By a process somewhat intricate and tedious, but well established, he might be sued nevertheless to judgment and execution in respect of any cause of action over which the English Courts

(x) [1893] A. C. 602, 624.



had jurisdiction. The Courts permitted a course of procedure against him which ended in his outlawry, and, that being once established, the plaintiff proceeded to judgment and to an equivalent for execution against any property of the defendant in England. So, with regard to a foreigner and alien, the Courts, by permitting a writ of distringas to issue against any property of his found within the jurisdiction, compelled him to appear, or pursued him to outlawry and judgment." *Matthews v. Erbo* (y) is distinct authority that the procedure was applicable to a foreigner. It was there moved to set aside an execution upon an outlawry against the defendant, upon affidavit that the defendant was an alien merchant, and lived beyond the sea, and was comorant there during all the time that the plaintiff proceeded to outlaw him. But it was denied by the whole Court, because by this means any person might contract debts and then go beyond sea, and so he will be out of reach of the law. The remedy existed in respect of all actions, whether in contract or tort. Tidd (z) says: "So penal were the consequences of an outlawry, that until some time after the conquest, no man could have been outlawed except for felony. But in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions vi et armis, and since, by a variety of statutes, process of outlawry lies in account, debt, detinue, and divers other common or civil actions." (a) Nor was it necessary that the whole cause of action should have arisen within the jurisdiction. In *Jackson v. Spittall* (b) the Court had to consider whether the words "cause of action" in s. 18 of the Common Law Procedure Act, 1852, mean the whole cause of action, or the act on the part of the defendant which gives the plaintiff his cause of complaint, and Brett, J., delivering the judgment of the Court, took occasion to examine the law at the time the statute was passed, and quoted the following passage in the judgment of Eyre, C.J., in *Ilderton v. Ilderton* (c): "'Of matters arising in a foreign country pure and unmixed with matters

(y) 1 *Ld. Raym.* 349.

(z) 9th ed., 131.

(a) See also *Coke* 128 b.

(b) *L. R.* 5 C. P. 542.

(c) 2 *H. Bl.* 145, 162,

arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded (i.e., the fiction as to venue), and we cannot proceed without it; but, if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action the cause of which arises here, we have jurisdiction. . . . In the very infancy of commerce, and in the strictest times, as I collect from a passage in Brooke (*d*), the cognizance of matters arising here was understood to draw to it the cognizance of all matters arising in a foreign country which were mixed and connected with it; and in these days we shall hardly hesitate to affirm that doctrine.’” Further on Brett, J., says: “There is no trace of any objection ever having been maintained on the ground that in a transitory action there was no jurisdiction unless every fact necessary to be proved in order to support the action occurred within the jurisdiction.” In Coke (*e*) it is said that when part of the act, especially the original, is done in England, and part out of the realm, the whole issue may be tried in England, and the following example is given: It was covenanted by indenture by charterparty, that a ship should sail from Blackney Haven, in Norfolk, to Muttrell, in Spain, and there remain by certain days. In an action by covenant upon the charterparty, the indenture was alleged to have been made at Thetford, in the county of Norfolk, and upon pleading the issue was joined whether the ship remained at Muttrell, in Spain, by the said certain days. And it was adjudged that this issue should be tried at Thetford, where the action was brought, because there the contract took his original by making of the charterparty, and so hath it been adjudged in such like case. In addition to the remedy of outlawry, there existed in London, Bristol, Liverpool, and other English cities, a custom of foreign attachment quite identical in principle with the process by outlawry. By the London custom, in case of any plaint of debt levied in the Mayor’s Court, followed by a process and a return of nihil, and the

(*d*) Trial, pl. 93.

(*e*) 26 I. b.

defendant could not be summoned, the plaintiff could attach a debt owing to the defendant by a person found within the jurisdiction of the Court, and after four defaults by the defendant, the Court would award execution against the garnishee to pay the plaintiff on the plaintiff giving security, to restore to the defendant the sum attached if the defendant within a year and a day came into Court and disproved the plaintiff's debt. The custom applied to foreign debtors (*f*). Speaking of the custom in *Douglas v. Forrest* (*g*), Best, C.J., said that the defendant might be in the East Indies whilst the proceedings were going on against him in the London Court. For a full examination of this custom, see *Mayor, etc., of London v. Cox* (*h*). Legislation that finds its roots in the common law cannot be very far wrong in principle. This principle it is now our duty to briefly trace.

If the legislation were solely for the benefit of English suitors as against foreign debtors, its selfishness and insular character would at once attest to the motives governing its origin. If the legislation conferred jurisdiction regardless of where the cause of action arose, then no more need be said than that the legislature had run amuck. The quality of limitation in the legislation gives rise to this important result, that the jurisdiction only attaches with the presumed consent of the defendant. In the case of a contract made and to be performed in England between persons permanently residing in England, a voluntary act is followed by an involuntary result, unless specially provided against—the interpretation and enforcement of their rights by an English Court in accordance with English law. The exercise of choice is an active one, and must be positively shown. In the cases provided in either the Common Law Procedure Act, 1852, or Order XI., r. 1 (e), the parties are presumptively dealing with one another in the sphere of choice, the voluntary act of contracting is followed by a voluntary result, the interpretation of their rights by whatever law they are shown to have agreed upon, and the enforcement of their rights in

(*f*) 8 Amer. & Eng. Ency. 289.

(*g*) 4 Bing. 701.

(*h*) L. R. 2 H. L., 239.

an English Court as being in accordance with their intention. To state the proposition in another form, the legislature has created a jurisdiction to accommodate the mind of the parties. In the recent case of *Comber v. Leyland* (i) the Earl of Halsbury, L.C., glanced at this matter in the following observation upon Order XI., r. 1 (e): "Now let us see what the rule is with which we are dealing here. It is a somewhat artificial provision which is apparently intended to extend the power of suit by persons in this country against persons in foreign countries. For very obvious reasons, reasons which indeed have been made very apparent by the view which foreign countries have taken of an attempt to exercise the jurisdiction of Her Majesty's Courts in places beyond Her Majesty's dominions, it is provided that the action must be founded upon a 'breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction.' That is the limitation of this effort to extend the process of these Courts to foreign countries. One can see exactly what was meant by, that: that where the parties have agreed that something is to be done in this country, some part of the subject-matter of the contract is to be executed within this country, it is a sort of consent of the parties that wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country."

A similar view was taken of the Common Law Procedure Act, 1852, by Cresswell, J., in *Simonin v. Mallac* (j): "The parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by the English tribunal. Huber, 65, tit. I. De Foro Competente, says: 'Sequitur causa fori tertia quam rem gestam esse diximus eamque vel à delicto vel à delicto admissio.' The same doctrine is to be found in John Voet, Boullenois, Donellus, and Story. The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 19, which allows a writ of summons to be issued against a person residing out of the jurisdiction, and not being a British

(i) [1898] A. C. 527.

(j) 2 Sw. & Tr. 67.

subject, and proceedings to be had thereon, notice of such writ having been served on the party, appears to have been founded on this principle."

It may be urged that, unfortunately for this view, Prof. Dicey has declined to unqualifiedly accept it. In his article, *The Criteria of Jurisdiction* (*k*), after stating that the jurisdiction of the courts of a country where a contract is intended to be performed, and is in fact broken, may be explained as an extension or application of the principle of submission, and that if X. contracts with A. to do something, e.g., build a house or deliver goods in France, there is some ground for the assumption that X. and A. tacitly agree to submit any controversy as to the performance of the contract by X. to the decision of the French Courts, he adds, "If this explanation be thought far-fetched," etc. There is this gloss to be put upon Prof. Dicey's statement: he is expounding the test of jurisdiction by the principle of extra-territorial effectiveness, while it is the purpose of this article merely to establish that the jurisdiction in question, while locally applied, rests upon a principle, and not upon arbitrary legislation. It is not sought to set up for the jurisdiction an extra-territorial operation as being within the principle enunciated in *Rousillon v. Rousillon* (*l*), that a judgment will be extra-territorially enforced where the defendant contracted to submit himself to the forum in which the judgment was obtained.

The contention that the jurisdiction in question can be vindicated upon the principle of consent, obviously depends upon the parties having entered into a contractual relation. In cases of tort it is impossible to assume a consent on the part of the defendant to the plaintiff pursuing his remedy against him where the cause of action arose. And yet the provisions of the Common Law Procedure Act, 1852, were held applicable to actions in tort. In *Cherry v. Thompson* (*m*) Blackburn, J., said: "It appears to us that the

(*k*) 8 L. Q. Review 21, 37.

(*l*) 14 Ch. D. 371.

(*m*) L. R. 7 Q. B. 573.

legislature in s. 18 of the Common Law Procedure Act has intended to carefully distinguish between actions ex delicto and actions ex contractu, and to enable the British subject resident abroad, or a foreigner out of the jurisdiction, to be served with process, and sued in our Courts, in an action of tort, where the whole cause of action arises in this country. . . .” The answer to this objection appears to be that in this respect the Common Law Procedure Act transcended the limits of defensible legislation. The absence of the power of allowing service out of the jurisdiction in actions of tort in Order XI., r. 1 (e), furnishes a speaking commentary upon its presence in the earlier Acts.

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ACTIO PERSONALIS CUM PERSONA MORITUR.

(Continued.)

The case of *Concha v. Murrieta* (*h*) is also another authority for this position, which seems to be fortified by the strongest judicial opinion of England. In that case Maria Concha, wife of Juan Jose Concha, a Chilean domiciled in England, died in 1853. The only child of the marriage, Adelinda Concha, on the 12th June, 1855, intermarried with her uncle, Ramon Concha. According to the law of Peru and Chili, one-half of the property acquired by either husband or wife devolved on the death of Maria Concha on Adelinda, and the father was entitled to administer the estate for his infant daughter. In 1855 he improperly sold a part of the infant's property thus acquired for much less than it was worth. He died in 1860, and the daughter now claimed compensation out of her father's estate for the loss occasioned by the disadvantageous sale. The Court, in holding her entitled to the relief claimed, spoke thus at p. 553, per Cotton, L.J.: "It was urged upon us that to allow this claim would be contrary to the maxim of English law 'actio personalis cum persona moritur.' It is true that no action for a tort can be revived or commenced against the representatives of the person who committed it; but the case is quite different when the act is not a mere tort, but is a breach of a quasi-contract, where the claim is founded on breach of a fiduciary relation or on failure to perform a duty. Here the father, though I do not call him a trustee, was in a position in which he owed duties of a fiduciary character to his daughter. . . . Here then is what we call a quasi-contract, the law implying a contract that a man will faithfully perform the duties which he has undertaken. Juan Jose

(h) 40 Ch. D. 553.

Concha undertook a duty in consequence of his position, and losses arising from his breach of it can be followed up against his estate."

I have written at some length on the part that the maxim plays in the law of contract; it yet remains for me to deal with some of its phases in the domain of tort. For, although the rule of non-survival is at law of universal application when considered in its relation to an action founded on a delict, yet there are cases where justice and equity proclaim that the rule shall not apply, and this without making uncertain the principle that forms the subject of this essay.

Although an action for a mere tort undoubtedly dies with the person, where besides commission of the wrong property is acquired which benefits the deceased, an action for the value of the property is held to survive against the representative. That principle appears as far back as the time of Charles II. In *Perkinson v. Gilford* (i) debt was brought against the executors of a sheriff, for money which he had levied under an execution and had not paid over; although this dereliction of duty was a misfeasance, as well as a non-feasance, yet it was held that debt and not tort lay against that officer. Coming down to more recent times, we have the grave and polished judgment of Lord Mansfield in *Hambly v. Trott* (j), in which that judicial innovator, while compelled by precedent and authority to hold that trover would not lie against an executor for his testator's conversion, declared that where "the act of the offender is beneficial, his assets ought to be answerable." I shall have occasion hereafter, in referring to other cases on this topic, to cite portions of that incomparable opinion, and consequently, I shall abstain from further commenting upon it.

In *Garth v. Cotton* (k) Lord Chancellor Hardwicke says: "However, I will admit for argument sake that the action of trover for the timber, as well as the strict action of waste, would have been gone at the common law; but, not-

(i) Cro. Car. 539.

(j) Cowp. 371.

(k) 1 W. & T. L. C. Eq. at p. 846.



withstanding that, I am of opinion that the plaintiff is entitled to the same relief in this Court. . . . There have been several determinations in this Court where, by the force of the rule *actio personalis moritur cum persona*, the remedy at law hath been extinguished; yet equity hath given the like satisfaction. . . . It is well known that at common law, before the statute, . . . no action or remedy could be had against the executor of an executor for a devastavit committed by the first executor, of the goods of the original testator. But, notwithstanding this, equity did not scruple to get the better of this artificial maxim and decreed an account and satisfaction against the representatives of such a wasting executor out of his assets. . . . This is the rule as laid down in equity by Lord Chancellor Nottingham in the case of *Price v. Morgan* (l). His words are, ‘Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last; and therefore, whatever estate of the wasting executor is come to the representative, which his testator wasted, the personal estate of such wasting executor in the hands of his executor shall answer.’ ”

Again, in *Marquis of Lansdowne v. Marchioness Dowager of Lansdowne* (m), which was a demurrer to a bill against the representative of a deceased tenant for life for an account of equitable waste committed by him, the Vice-Chancellor (n) said: “It has been urged that if the Marquis had committed legal waste, and died, his representatives would not have been answerable, it being a maxim *actio personalis cum persona moritur*, and that the same doctrine applies by analogy to cases of equitable waste. Let us see in what manner this maxim has been interpreted even at law. In *Hambly v. Trott* Lord Mansfield says: ‘Where the cause of action is money due or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, or a promise of the testator, express or

(l) 8 Ch. Cas. fol. 215.

(m) 1 Madd. 116.

(n) At p. 138.

implied,—where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or arises *ex delicto* (o) supposed to be by force and against the king's peace, there the action dies,—as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many other cases of the like kind. . . . If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man. etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator from the value or sale of the trees he shall. So far as the tort itself goes, an executor shall not be liable; and therefore it is that all public and private crimes die with the offender, and the executor is not chargeable; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged.' This I take to be a just exposition of the qualifications under which the maxim *actio personalis moritur cum persona* is received at law, and if equity is to decide in analogy to a court of law, the question in the present case will be, 'Whether, by the equitable waste committed by the late Marquis, he derived any benefit, or whether it was a naked injury by which his estate was not benefited. It is clear it was benefited; and as at law, if legal waste be committed, and the party dies, an action for money had and received lies against his representatives; so, upon the same principle, in cases of equitable waste, the party must through his representatives refund in respect of the wrong he has done.' 'It would,' says Lord Cowper in *Bishop of Winchester v. Knight* (p), 'be a reproach to equity to say, when a man has taken my ore or timber and disposed of it in his lifetime and dies, that in this case I must be without remedy.' "

(o) As is said in *Hole v. Blandford*, Sir T. Raym. 37.

(p) 1 P. Wms. 407.

Later on the very same doctrine was put forth in *Powell v. Rees* (*q*); in that case an administrator was held liable to an action for money. had and received by the intestate for coal tortiously taken by him from the plaintiff's land, when the deceased had sold the coal so taken, and converted it into money. The distinction so elaborately set forth by Lord Mansfield in *Hambly v. Trott*, and referred to above, was approvingly cited by Lord Denman in giving the judgment of the Court, as law that must pass unquestioned.

*(To be Continued.)*

JOHN J. POWER.

*(q)* 7 A. & E. 426.

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## EDITORIAL REVIEW.

**Club Law for Women.**

The expulsion of Beta Beta chapter from Kappa Kappa Fraternity on the ground of "lack of proper material for the maintenance of the chapter," gave rise to an interesting and novel cause in the New York Supreme Court, St. Lawrence county. The action was brought by the members of a local chapter at a college town in the State of New York against the members of the grand council of the fraternity—one of the numerous Greek letter societies which exist in the colleges of the United States—to enjoin the defendants from consummating the withdrawal of the plaintiffs' chapter from the Order. The parties on both sides of the record were women, young or middle-aged, graduates or undergraduates of women's colleges. It was proved that the fraternity was possessed of a large amount of property. The actual cause of complaint against the plaintiffs' chapter, covered by the vague words "lack of proper material," was that the women comprising the chapter were lacking in culture and refinement. It was obviously impossible for the plaintiffs to remain quiet under such an imputation. The action was brought and was evidently vigorously contested. The trial Judge, Mr. Justice Russell, is delicately ironical in his treatment of the charges made against the plaintiffs, which the defendants' counsel—of the opposite sex—did not press at the trial. "So far as the masculine judgment of feminine culture and refinement, limited as it is in the finer lines, can judge of such delicate subjects from the appearance of the ladies who were witnesses upon the trial, the members of other chapters would need to be of a rare order to justify holding themselves so superior in acquired and natural qualities as to render uncongenial to them the active and *alumnæ* members of Beta Beta Chapter. . . . It will not answer to say that a prosecution, which was instituted upon the basis of unfitness for refined feminine association and culminated in a judgment of perpetual exclusion,

is purified and made the proper foundation for such a judgment because, while it did not in any way pass against the truth of the more precise charge of want of culture and refinement, it ostensibly placed such judgment on the general ground which might cover any unfitness." Despite the interesting nature of the proceedings which led up to the cause, its determination involved only the dry legal questions whether the injury was such as to warrant the Court in interfering, and whether the proceedings of the defendants were in accordance with natural justice. These questions were resolved by the trial Judge in favour of the plaintiffs, who, if the judgment stands, will be restored to full privileges by a decree in the nature of an injunction.

#### **Chief Justice Marshall.**

At the meeting of the American Bar Association at Buffalo this month a proposition is to be submitted for celebrating the 4th of February, 1901, as "John Marshall Day." On the same day of 1801 Chief Justice Marshall first took his seat in the Supreme Court of the United States.

#### **Jurisdiction as to Foreign Lands.**

In *Strange v. Radford*, 15 O. R. 145, it was held that the Court could not enforce a mortgage over foreign lands by decreeing a sale. *Burns v. Davidson*, 21 O. R. 547, was the next case in our own Courts in order of time. It was there decided that an action to set aside as fraudulent against creditors a conveyance of lands in a foreign country would not lie. The decision in *Henderson v. Bank of Hamilton*, 20 A. R. 646, 23 S. C. R. 716, was that a creditor who had recovered judgment in Manitoba, and who had in consequence a lien on the lands of his judgment debtor there, could not maintain in the Courts of Ontario an action against a mortgagee for redemption of a mortgage on lands in Manitoba which were subject to the lien. The Supreme Court of Canada in *Pavey v. Davidson*, 26 S. C. R. 412, held that, even where all parties resided in this Province, an action could not be maintained here by a creditor to have a mortgagee of foreign lands declared a trustee for the debtor of the moneys secured by the mortgage. In line with these

decisions, though not directly based upon them, is a recent judgment of Sir William Meredith, C.J., in *Gunn v. Harper*, noted in this number of the Occasional Notes, p. 281. The action was brought to have it declared that a conveyance made in 1878 by the plaintiff to the defendant Gunn of lands in the Province of Quebec and in Colorado, though absolute in form, was intended to be a mortgage, and for redemption and other relief. The other defendants were persons deriving title under an absolute conveyance of the property from the defendant Gunn, and they pleaded the Statute of Limitations. All the defendants resided within the jurisdiction. The Chief Justice was of opinion that if the action had been against the plaintiff's grantee alone, and the rights of the other defendants had not been created by him, the action would have lain, by reason of the exceptional jurisdiction which Courts of equity have to operate in personam, and to compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction. The title, however, being in the other defendants, the Court had no power to declare them constructive trustees of foreign lands, and, besides, the defence that the plaintiff's title had been extinguished by the operation of the Limitations Act raised a question of title which could not be determined here.

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# THE CANADIAN LAW TIMES.

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SEPTEMBER, 1899.

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## UNIFORMITY IN PROVINCIAL LAWS.

IT will not, we presume, be disputed that a greater uniformity in the laws of the different provinces, especially those relating more peculiarly to commerce, would be a material advantage to commercial interests in the Dominion. There are some differences between the laws of the various provinces for the existence of which there is no rational ground and which might with advantage be reduced to uniformity.

Perhaps one of the most striking instances of this unnecessary diversity is to be found in that part of the law of principal and agent relating to goods intrusted to an agent, as modified by the different Factors' Acts in force in some of the provinces. In British Columbia and the North-West Territories enactments have been adopted making the law the same as the present law in England. In Ontario and Nova Scotia the statutes in force are practically identical with one of the earlier Imperial Acts, 5 & 6 Vict. cap. 39. In Manitoba the law would be the same as in Ontario but for certain provisions of the Manitoba Sales of Goods Act, an Act which was taken bodily from the Imperial Act, and the repealing section of the Imperial Act 52 & 53 Vict. cap. 45.

In New Brunswick and Prince Edward Island the common law has, so far as we can ascertain, been left unaltered by any statutory enactments.

In order to understand clearly what these differences are, it will be necessary to see what the common law is and how it has been altered in the provinces in which it has been altered. In the judgment of Blackburn,

J., in *Cole v. North Western Bank* (a) we find the following statement of the common law on this subject:—  
“At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. . . . The general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced bona fide to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it.”

Now, the mere intrusting goods to an agent whose business it is to sell, was held to clothe him with an apparent authority to sell, and so at common law, if goods were intrusted to such an agent, he could sell them and give an innocent purchaser a valid title as against the owner. But he could not pledge the goods, because pledging was not within the scope of the business of an agent for sale; consequently, a person bona fide advancing money on goods in the possession of an agent, which that agent had a right to sell, and of which he was apparent owner, was liable to have his claim on the goods defeated upon its transpiring that the agent was not the real owner and had not authority to pledge.

And this was one of the mischiefs which it was sought to remedy by the Factors' Acts.

The first three of these Acts were:—4 Geo. IV. cap. 83; 6 Geo. IV. cap. 94; and 5 & 6 Vict. cap. 39.

The two former Acts we do not need to consider here; the third, however, must be noticed, as it is practically the same as the Act as present in force in Ontario and Nova Scotia.

In that Act it is recited that whereas advances on the security of goods and merchandize have become an usual

(a) L. R. 10 C. P. at p. 362.



and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be extended to bona fide advances upon goods and merchandize as by the recited Act—6 Geo. IV. cap. 94—is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title, should in all cases where such owners by the said recited Act or otherwise would be bound by a contract or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances bona fide made on the security thereof.

The first section then enacts that: “From and after the passing of this Act any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bona fide made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.”

There were two cases decided in England under this state of the law which require notice, because the law as laid down in these cases is the law in Ontario to-day. The first is the case of *Fuentes v. Montis* (b), where it was held that an agent intrusted with and in possession of goods or of the documents of title to goods, within the meaning of the Factors' Acts, is a person who is intrusted as agent for sale, and consequently one whose authority to sell has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked and the goods

(b) L. R. 3 C. P. 268, L. R. 4 C. P. 93.

demanded from him by his principal. The other case is *Johnson v. Credit Lyonnais Co.* (c). In this case it was held that when a person bought goods, leaving a document of title in the hands of the vendor, the vendor was not intrusted by the purchaser as his agent within the meaning of the Factors' Acts, and could not therefore give a good title to a person bona fide advancing money on the faith of such documents of title.

The law as laid down in these cases was remedied by the next Factors' Act, 40 & 41 Vict. cap. 39, and finally all the former Acts were repealed and their various provisions consolidated by the 52 & 53 Vict. cap. 45, which is the Act in force in England to-day.

In this country, as already observed, we find the law in the different provinces in all stages of development.

British Columbia and the North-West Territories have adopted Acts practically the same as the Imperial Act 52 & 53 Vict. cap. 45, so that the law in these provinces is the same as in England.

Ontario adopted the provisions of one of the earlier Imperial Acts, 5 & 6 Vict. cap. 39, but has never followed this legislation up by adopting the amendments introduced by 40 & 41 Vict. cap. 39 and 52 & 53 Vict. cap. 45. Consequently, the law in Ontario is the same as the law in England when *Fuentes v. Montis* and *Johnson v. Credit Lyonnais Co.* were decided. See *Bush v. Fry* (d). The same remark applies to Nova Scotia.

In Manitoba we find a curious state of the law. The Manitoba legislature has never passed a Factors' Act, but, by reason of their having adopted the law as it was in force in England on the 15th day of July, 1870, the first three of these Acts, 4 Geo. IV. cap. 83, 6 Geo. IV. cap. 94, and 5 & 6 Vict. cap. 39, would no doubt be part of the law of that province, had they not been repealed by 52 & 53 Vict. cap. 45. Moreover, the Imperial Sales of Goods Act has been adopted by the Manitoba Legislature, 59 Vict. cap. 25, and certain of the provisions of the Imperial Factors' Act were re-enacted

(c) 3 C. P. D. 32.

(d) 15 O. R. 122.

in different language in the Imperial Sales of Goods Act, and consequently have passed into the Manitoba Act 59 Vict. cap. 25. These sections of the Imperial Act which have so passed into the Manitoba Act are sections 8, 9, and 10, the provisions of 8 and 9 appearing in different language in section 24 of the Manitoba Act, and section 10 appearing as section 44 of the Manitoba Act. Section 8 is the section which altered the law as laid down in *Johnson v. Credit Lyonnais*.

New Brunswick and Prince Edward Island, as already noted, have no Factors' Acts.

As we have already said, there is no reason for this diversity, and we have the remedy ready made. All that is necessary is that the provinces which have not already done so should adopt the provisions of the Imperial Act 52 & 53 Vict. cap. 45. If this were done, it would not only be a step towards uniformity in our commercial law, but defects in the law in those provinces which have not yet adopted the Imperial Act would be cured.

There are other instances in which, by adopting this ready-made remedy of English legislation, we might not only get a greater uniformity in the laws of the different provinces, but also cure defects in the common law and set at rest some points which are now doubtful. Why, for instance, should not the Imperial Sales of Goods Act, which has been adopted by British Columbia, Manitoba, and the North-West Territories, be adopted by the other provinces? Why should not the other provinces adopt the codification of the law of partnership which has been adopted in British Columbia and Manitoba? And why should not all the Provinces have the same Infants' Relief Act, and the same provisions, as nearly as possible, as to the property of married women?

There is no reason why we should not profit by the experience of the jurists of the older country, provided that in appropriating their work we appropriate it intelligently and with a due regard to its applicability to the conditions existing in this country. Of course, the Imperial legislature is by no means infallible, but it is hardly necessary to say that many of the changes which are introduced by Imperial legislation, to meet cases which arise in the natural

development of the law, are undoubtedly beneficial. Our law springs from the same sources and in many instances its development is along the same lines, and accordingly much of the Imperial legislation will be found to meet the requirements of our law.

We would venture to suggest that in all the instances above mentioned the changes made by the Imperial legislature have been beneficial, and, apart altogether from the question of uniformity, might be adopted in this country with advantage.

R. B. HENDERSON.

NOTE.—The law of the Province of Quebec is not dealt with.

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## ACTIO PERSONALIS CUM PERSONA MORITUR.

*(Concluded.)*

The recent case however of *Phillips v. Homfray* (r), and the able and exhaustive judgments therein delivered, furnishes us with a crucial test of the meaning and limits of the maxim, the celebrated utterance of Lord Mansfield in the case referred to being the basis again of the decision. The suit was instituted in 1866 by the plaintiffs against Homfray and others, including the deceased Fothergill, praying for a declaration that the defendants were liable in respect of certain coal and ironstone gotten and removed by them from under the plaintiffs' farm, etc., and that the defendants might be decreed to pay for the coal and ironstone wrongfully gotten by them from under the plaintiffs' farm, at their proper value. On the 28th of August, 1867, W. H. Forman, one of the defendants, died, and the suit was revived against his executors. The cause came on in due course for hearing before the Vice-Chancellor, together with the cross-suit of *Fothergill v. Collins*, wherein the defendants as plaintiffs in this suit prayed specific performance of an agreement for sale, against the plaintiffs as defendants, of a certain farm, with the result that by the Vice-Chancellor's order, though varied on appeal, it was declared that the defendants Homfray and Fothergill in this suit, together with the estate of the deceased Forman, were answerable to the plaintiffs as asked for in the statement of claim, and inquiries were directed. Pending them, Fothergill died, and one of the inquiries was stayed by Pearson, J. This decision being unsatisfactory to both parties, the result was the assertion of an appeal and a cross-appeal, on which Cotton and Bowen, L.JJ., stayed two other inquiries on the ground that a remedy for a wrongful act cannot be pursued against the estate of a deceased person, unless property or

(r) 24 Ch. D. 439.

the proceeds of value of property belonging to another person have been appropriated by the deceased person and added to his estate. What these inquiries were, is not material to the present discussion; the judgments, however, well deserve thorough and concentrated study, as they comprise an entertaining digest of the law at this day on the whole subject. At p. 454, the Court says: "The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be these in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. . . . In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued."

The judgments of the House of Lords in the celebrated case of *Peek v. Gurney* (s) also proceed on the same principle. At p. 390 Lord Chelmsford says: "It is a suit instituted to recover damages from the respondents for the injury the appellant has sustained by having been deceived and misled, by their misrepresentations and suppression of facts, to become a shareholder in the proposed company, of which they were the promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description, and that the same principles applicable to them must prevail both at law and in equity."

(s) L. R. 6 H. L. 377.

. . . The second question is, whether if the appellant is entitled to maintain his suit against the respondents, his remedy extends to the executors of the deceased director, Mr. Gibbs? On their behalf it is contended that this is a proceeding to recover damages for a wrong done, and that the maxim *actio personalis cum persona moritur* applies. There can be no doubt that if an action at law had been brought by the appellant instead of this proceeding in equity, the executors could not have been made liable; and in the exercise of a concurrent jurisdiction by Courts of law and equity, both Courts, as already intimated, ought to proceed upon the same principles.

. . . The same liability arises and on the same ground in Courts of law. As Lord Mansfield said in *Hambly v. Trott* (t): ‘Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man’s trees, but for the benefit arising to his testator for the value or sale of the trees, he shall.’ Mr. Gibbs’ estate derived no benefit from the representations to which he was a party, and therefore his executors, who can only be answerable for his acts in respect of his estate, cannot be made liable for the wrong done to the appellant. The learned counsel for the appellant was asked in the course of the argument whether there was any case in which equity had made personal representatives liable for damages, for a personal wrong, which might have obtained against their testator. To which no satisfactory answer was given. . . . No case has been produced, and I assume that none can be found, in which, upon a claim against a testator *ex delicto*, executors have been held liable in equity to answer for it in damages. And it appears to me that it would be contrary to principle to hold that an action which in a Court of law would be held to die with a testator, should be maintainable against executors in a Court of equity of concurrent jurisdiction. In my opinion, whatever might be the case as to the other respondents, the executors of Mr. Gibbs could not have been made liable in the present suit.”

(t) Cowp. 370.





The modification of the rule permitting actions founded in tort to survive that benefit the deceased's estate, suggested in the very able and philosophic judgment of that eminent Canadian jurist just cited, is one that is replete with reason and justice; and while my investigations do not enable me to say that it has ever received higher judicial sanction, it may, I think, be received as eminently sound law, not only in consideration of the sources whence it comes, but for the way in which it commends itself to our ideas of sense and right.

These cases, therefore, indicate that equitable rights and remedies may be asserted in equity by or against the personal representatives of or the person entitled to stand in the place of the deceased. But the case of *Jones v. Simes* (*w*) illustrates the perfect and multiform relief that is given against the maxim in the Court of Chancery. In that case the plaintiff, Jane Jones, on the 3rd December, 1888, commenced an action against the defendant, Charles Edward Simes, claiming a mandatory injunction and damages for an obstruction and interference with the access of light to the plaintiff's freehold house. The pleadings closed in due course, and the action was entered for trial on the 19th March, 1889. On the 15th October, 1889, the plaintiff died, and on the 3rd January, 1890, Benjamin Jones, her sole executor and devisee, proved the will, and on the 10th January, 1890, obtained an order to carry on the proceedings against the defendant, which the defendant now moved to discharge. The defendant was offered leave to amend his defence by pleading the statute 3 & 4 Wm. IV. c. 42, but this offer was declined. It was held that though any action by her executor, as such, for injury to the plaintiff's real estate might, under 3 & 4 Wm. IV. c. 42, s. 2, be limited to the six months prior to the plaintiff's death, still he could recover damages to this extent: that, with regard to the peculiar equitable remedy to have the obstruction to light removed, this was an equitable right subsisting in the plaintiff at the time of her death, which, with the equitable remedy by mandatory injunction, devolved on her executor

(\*) 43 Ch. D. 607.

as devisee, and consequently that proceedings could properly be carried on by him.

Per Chitty, J., at p. 612: "With reference to damages in a common law action of tort, the devisee, of course, could not recover them; they would form part of the personal estate and belong to the executors. . . . I think there is a right on the part of the legal personal representative to continue . . . the action. . . . The peculiar remedy to have the building removed was an equitable right, . . . which, though it did not pass to her executor—for the executor had no interest in the land—devolved or survived with the equitable remedy to her devisee, and I think the devisee is, in respect of the mandatory injunction, in the same position as his testatrix was. . . . The fallacy of the defendant's argument lies in comparing the right to the mandatory injunction to a common law action of tort; it even went so far as to say that if the wrongdoer, the present defendant, had died, and the original plaintiff was still alive, that the action could not have been maintained against his executor or his heir; this, in my opinion, is an extravagant proposition. . . . I therefore refuse the motion with costs."

So in *Oakey & Sons v. Dalton* (x) it was held that an action brought to restrain the infringement of a registered trade-mark, with the usual claim for an account of profits and damages, is not within the rule *actio personalis cum persona moritur*, but, being brought in respect of injury to the property of the owner of the mark, may be continued by his executors after his death. Per Chitty, J., at p. 702: "The executors take the personal estate of their testator, and the statement of claim shows sufficiently that the defendant has been infringing . . . the trade-mark, which is property: that is to say, injuring the property of the deceased man, and causing damage to his personal estate, which has diminished the amount of the assets. . . . I think the case is covered entirely by principle; the principle on which I proceed being that there is an injury to the personal estate of a deceased person, and that damages have been

(x) 35 Ch. D. 700

occasioned to that person's estate, and profits have accrued to the wrongdoer."

Even in those Courts whose polity is framed according to the common law, a remedy specifically equitable can be had to redress those wrongs that are peculiarly cognizable in tribunals of that kind. In *Hatchard v. Mège* (y) it was ruled that an action for maliciously and fasely publishing a statement calculated to injure the plaintiff's right of property in a trade-mark was put an end to by the death of the plaintiff after the commencement of the action only so far as it was a claim for libel, but so far as the claim was in the nature of slander of title the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage. Per Day, J., at p. 774: "The statute 4 Edw. III. c. 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libelled. . . . That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. . . . It is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. . . . Here, as in all other actions on the case, there must be *et damnum et injuria*."

Of course, no matter what the hardship may be, a Court of equity cannot revive against the positive provisions of an Act of Parliament. In *Kirk v. Todd* (z) the plaintiff brought his action for damages and an injunction against the firm of Todd & Sons for torts committed by the firm. The firm consisted of Todd alone, who died more than six months after the commencement of the action, and the action was continued against his executors; the tort complained of was fouling a stream, which caused no benefit to the defendants. It was held, affirming the decision of Vice-Chancellor Hall, that Todd having died more than six months after the commission of the acts complained of, no action either for damages or injunction could be maintained against his executor.

(y) 18 Q. B. D. 771.

(z) 21 Ch. D. 484.

Per Jessel, M.R.: "I cannot help feeling that this is a very hard case, and that no doubt is the reason why the appeal was brought, but we must not allow hard cases to make bad law. . . . As I understand the rule at common law, it was this; you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages. That rule has never been altered except by the Act 3 & 4 Wm. IV. c. 43, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here; therefore the statute did not apply and the rule of common law remained in its simplicity."

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I now propose to dwell briefly on the effect of the maxim in those cases where the death of a person has been caused by the wrongful act or negligence of another. The common law rule in this respect may be broadly stated to be, that an executor or administrator cannot maintain an action for the loss of the life of the testator or intestate, though this has not become established without vigorous dissent upon the part of able judges.

The earliest case in which we find this doctrine laid down is *Higgins v. Butcher (a)*, decided in the King's Bench in the time of James I., where Tanfield, J., is reported as saying: "If a man beats the servant of J. S., so that he dies of that battery, the master shall not have an action against that other for the battery and loss of service, because the servant dying of the extremity of the battery, it is now becoming an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost. Quod Fenner and Yelverton concesserunt."

If, however, the merger of the civil remedy into felony be the reason of the rule, the maxim in that behalf cannot prevail in Canada in view of section 534 of the Criminal

(a) Yelv. 89.

Code, 1892; and, following *Flick v. Brisbin* (b), that legislation cannot be said to be beyond the competency of the Federal Parliament to enact. But its existence is also accounted for on other grounds, among which are public policy, the law of forfeiture, and the maxim under consideration. The doctrine as enunciated by Lord Ellenborough, in a case to be hereafter considered, that "in a civil Court the death of a human being cannot be complained of as an injury," certainly presents some very anomalous aspects, which, it can be safely said, are somewhat repulsive to our system of rational jurisprudence, but withal, while it is the law, it must be followed until otherwise decided by competent judicial or legislative authority.

The next leading case upon this topic is *Baker v. Bolton*, decided at nisi prius in 1808, and is reported in 1 Camp. 493. It was an action against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned, whereby the plaintiff himself was much bruised and his wife was so severely hurt that she died about a month after in a hospital. The declaration, besides other special damage, stated that "by reason of the premises the plaintiff has wholly lost and has been deprived of the comfort, fellowship, and assistance of his said wife, and has from thence hitherto suffered and undergone great grief, vexation, and anguish of mind." It appeared that the plaintiff was much attached to his deceased wife; and that, he being a publican, she had been of great use to him in conducting his business. But, says the report, "Lord Ellenborough said the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution. In a civil Court the death of a human being could not be complained of as an injury; and in this case the damages to the plaintiff's wife must stop with the period of her existence."

Lord Campbell's Act—9 & 10 Vict. c. 93—on which more will be hereafter said, gave an action to the family for the

(b) 26 O. R. 423.

recovery of damages resulting from death, thereby partly remedying the law as theretofore laid down in these cases. This piece of legislation has been since the model for similar Acts of Parliament in all those countries where the common law of England has prevailed.

The question again came before the Courts in England in the well-known case of *Osborne v. Gillett* (c), in which an attempt was made, though unsuccessful, to overrule *Baker v. Bolton*, supra. In this case the declaration claimed for injuries caused to Elizabeth Osborne, the plaintiff's daughter and servant, by the negligent driving of the defendant's servant, by reason whereof she afterwards died, and the special damage allowed was the loss of the daughter's services and her burial expenses. The defence was "that the daughter was killed on the spot," and "that the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted." Held, on demurrer, that the first plea was good, Bramwell, B., dissenting, and by the whole Court, that the other plea was bad.

It is worthy of note that in this last case the dissenting judgment of so able a lawyer as Lord Bramwell makes considerably for the contention that this rule is one that is not founded on justice or reason. In some of the American States this difficulty is bridged by holding that death is not absolutely instantaneous with the injury, and that there must be a moment of time in which the deceased had a right of action which, under the statute, survives to the representatives (d).

One might profitably dwell on the many legal inconsistencies produced by the rule; how a master can sue for injuries done to his servant by a wrongful act or neglect whereby the service of the servant is lost to the master, while, if the injury causes the servant's death, the master's remedy is gone; how another phase of the law provides a remedy for the seduction of a daughter, founded on the legal fiction of loss of service, while it now denies a remedy for a

(c) L. R. 8 Exch. 88.

(d) *Murphy v. New Haven Co.*, 30 Conn. 184; *Whitford v. Panama R. W. Co.*, 33 N. Y. 486.

permanent loss of service caused by death; but, interesting and instructive as they might be, it is beyond the scope and intention of this essay to attempt anything of the kind. All that can be said is that the oracle of the law speaks this and it must be obeyed, if not listened to in the spirit of reverence or accorded that assent which all good law deserves.

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I come now to discuss within a brief space a doctrine of the practice and procedure of our Courts that is incidental to the maxim. I refer to the abatement of causes of action which survive for and against representatives by the death of a party thereto; and to those cases which by their nature cannot be revived, and fall within the scope of the maxim.

Under the present practice in this Province, which is the same as that which prevails in England and in Ontario, and in those Provinces and States of the American Union which have followed the English Judicature Act as a code of polity, it is ordered that "A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite; and whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death." (e)

The Rule, it has been held, applies only when the cause of action survives or continues in some person who is before the Court (f).

The latter part of it is an insertion of the provisions of 17 Chas. II. c. 8, which enacted that "in all actions, real, personal, or mixed, the death of either party between the verdict and the judgment should not thereafter be alleged for error, provided the judgment be entered within two terms

(e) Nova Scotia Jud. Act, Rev. Stats. 5th ser., cap. 104, Order XVI., R. 1.

(f) *Eldridge v. Burgess*, 7 Ch. D. 411.

after the verdict." This appears in the English Common Law Procedure Act, 1858, s. 139, and in the Ontario Common Law Procedure Act (Harrison) of 1858, s. 218. The same practice prevailed at an early period in the procedure of the Courts of this Province as part of the statute law of England, introduced here as being " obviously applicable and necessary " to our colonial condition (*g*).

Where either of the parties to a suit die before an arbitrator or referee has filed his award, it has been held that the authority of the arbitrator is determined by such death, even where the submission is made by an order of Court, and a verdict is taken, subject to the award (*h*).

In *Cooper v. Johnston* it was contended on the argument that the statute 17 Car. II. c. 8 met a difficulty of this kind, but, per Abbot, C.J.:—" It is of great importance that the decision of both Courts should be the same upon this point. The Court of Common Pleas has already decided, . . . that the death of either party is a revocation of the arbitrator's authority, and that decision ought to be abided by. It may be very proper in orders of nisi prius in future, to insert a clause to obviate the inconvenience arising from the death of either party, before the making of the award."

But in actions which survive for or against the personal representative of the deceased party, the insertion of a clause in an order of reference that in the event of the death of either party before the making of the award, it shall, when made, be delivered to the representative of the deceased, appears to be valid for and against executors and administrators (*i*). Per Curiam at p. 145: " The death of a party generally speaking operates as a revocation of an arbitrator's authority. This rule, however, has provided in express terms for that event; and an award made under such a rule, after the death of a party, in ordinary cases, would clearly be valid."

(*g*) *Uniacke v. Dickson*, James Reps. 287; *Murdock's Epitome of the Laws of Nova Scotia*, Book III., p. 159; *Revised Statutes of N. S.*, 1st ser., cap. 134, sec. 123; *Revised Statutes of N. S.*, 4th ser., cap. 94, sec. 106.

(*h*) *Cooper v. Johnston*, 2 B. & Ald. 394; *Rhodes v. Haigh*, 2 B. & C. 345.

(*i*) *Tyler v. Jones*, 3 B. & C. 144.



But where the action is founded on tort, even where the order of reference contained a clause that the arbitrator should publish his award, "ready to be delivered to the parties in difference or such of them as require the same, or their respective personal representatives, if either of the said parties die before the making of the award," Brett, M.R., in *Bowker v. Evans* (*j*) said: "The stipulation as to the delivery of the award to the respective personal representatives, . . . being a matter of procedure, . . . had been introduced inadvertently, and we must decide . . . on the footing that the cause of action was one upon the death of the plaintiff, that the jurisdiction of the arbitrator then determined, that there was nothing for him to decide, and that his award cannot be enforced."

The law however seems to be otherwise where the cause of action has been determined, and damages only are referred to an arbitrator for assessment (*k*).

There are "causes or matters" which are not founded on tort that abate by reason of death, when no interest or liability devolves, and the matter has itself been disposed of by the decease of a party thereto. In *Stanhope v. Stanhope* (*l*) the petitioner on the 11th May, 1883, obtained a decree nisi for dissolution of his marriage on the ground of his wife's adultery. On the 27th July, 1883, he died. It was held on appeal that the legal personal representative of the husband could not revive the suit for the purpose of applying to make the decree absolute. Per Bowen, L.J., at p. 108:—"A man can no more be divorced after his death than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives unless it be dissolved sooner, and the Court cannot dissolve a union which has already been determined. . . . It is said that this divorce proceeding affects the personal estate of the husband, and that therefore his executor has an interest in it. No doubt it may affect his personal property, every change of status may affect personal property, but that is only consequential. The object of a suit

(*j*) 15 Q. B. D. 565.

(*k*) *Chapman v. Day*, 48 L. T. 907.

(*l*) 11 P. D. 103.

for dissolution of a marriage is not to affect property but to change the status, and it cannot be looked upon as a suit relating purely to property." Per Fry, L.J., at p. 111: "No power can dissolve a marriage which has already been dissolved by the act of God."

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Any treatment or discussion of this maxim would, I think, be incomplete if one did not refer, if only in passing, to the way in which it has been applied in the American Courts, for "our common ancestors won the great charter and the bill of rights, established free parliaments, the habeas corpus, and trial by jury. Our jurisprudence comes down from Coke and Mansfield to Marshall and Story, rich in knowledge and experience which no man can divide." (*m*)

The maxim itself is part of the common law of that country, which was recognized and adopted as one entire system by the early colonists in the days of British allegiance, as far as it was applicable to their situation and government. At the present time, however, there are in many of the States statutes which either entirely abrogate the maxim, or make extensive provisions for the survival of actions of all kinds; this, therefore, materially effects the consideration of the question, so that my remarks on this head must necessarily be brief.

As with us, a bare cause of action *ex delicto* does not survive, except where it results in pecuniary benefit to the wrong-doer (*n*).

On the other hand, in actions *ex contractu*, where the damages are purely personal in their nature, and do not affect property rights and interests, as pain of body, etc., the maxim is a complete bar to recovery of damages (*o*). But where the object of the action is to recover damages for injury to property, though connected with a personal injury, it survives to the extent of such damages.

Where, however, the action for damages for breach of contract affects the property of the testator, but the damages

(*m*) The Hon. Joseph Howe at Detroit, U.S.A., A.D. 1685.

(*n*) *Hambly v. Trott*, Cowp. 371; *Phillips v. Homfray*, 24 Ch. D. 439.

(*o*) *Chamberlain v. Williamson*, 2 M. & S. 408.

are only incidental to the personal injury, it is doubtful whether or not the maxim applies (*p*).

It cannot be said that the Courts of the United States, in cases which do not fall within some statute that modifies the maxim, have ever departed to any appreciable extent from those principles which form the foundation of our common law on this subject. While a study of state and federal decisions on the varying phases of the maxim would command our admiration and attention in consideration both of the talents and learning of the eminent Judges who have delivered them, and their consonance with the spirit at all events of our own law, yet I do not think that it would offer any prospect of beneficial effect or practical utility commensurate with the amount of labour their length and number would entail.

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I now come in the last place to those Acts of Parliament which have been enacted from the earliest times as exceptions to or modifications of the maxim.

The rule that a personal action dies with the person was first altered in A.D. 1330 by the statute 4 Edw. III. cap. 7, of which the English version runs thus: "Item, whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life."

The remedy given by this enactment was further extended to executors of executors by 25 Edw. III. cap. 5, and to administrators by 31 Edw. III. cap. 11.

These statutes, being remedial in their nature, have always received a very liberal construction; they have been held to apply to all torts excepting those relating to the testator's freehold, and those when the injury done is of a personal nature (*q*).

(*p*) *Bradshaw v. Lancashire and Yorkshire R. W. Co.*, L. R. C. P. 189.

(*q*) *Twycross v. Grant*, 4 C. P. D. 40.

At common law no remedy was provided for injuries to the real estate of any person deceased, committed in his lifetime, but in A.D. 1833 the statute 3 & 4 Wm. IV. cap. 42 was passed to remove this blot on our law. Speaking of this statute, Mr. Justice Kekewich in *Jenks v. Clifden* (r) says: "The meaning of the statute, as I understand it, is this. At common law an action of this character fell within that class which was not permitted against the representatives of a deceased person, inasmuch as the right of action against him personally ceased at his death. It was intended to remedy that state of things, and that, subject to certain limitations and restrictions as regards time, a person whose light was obstructed or who could complain of a trespass should be entitled to bring his action against the representative of a deceased person just as if the deceased were still alive, and the action were brought against him. The restrictions are inserted to prevent the grievance which it was intended to remove being succeeded by a grievance in the opposite direction; but, subject to the restrictions, the representative seems to me to be placed on the same platform on which the testator or intestate was in his lifetime."

The second section of this statute gives, as indicated in the opinion just cited, an action to executors and administrators for injuries done to the realty of their testator, within six months previous to his decease, provided the action could be sustained by the deceased himself, and was brought within one year after his death; the same section also gives, subject to like limitations, a like action against representatives for like wrongs.

Nothing in these statutes affects the case of a personal injury causing death, for which, according to the maxim, there is no remedy at all.

The Legislature of this Province has placed similar enactments on the statute book in Revised Statutes of Nova Scotia, 5th series, cap. 113, secs. 1 and 2; New Brunswick, in the Consolidated Statutes there, cap. 52, sec. 46; Ontario, in the latest revision of 1897, cap. 129, secs. 10 and 11; Manitoba in the latest edition of the Revised Statutes, cap. 146,

(r) [1897] 1 Ch. at p. 698.

secs. 47 and 48; and the Province of Prince Edward Island in the Acts of the legislature of that Province, 28 Vict. cap. 6, sec. 8.

The consolidated statutes of British Columbia and the North-West Territories are not accessible to me at the present time, and prevent me giving the sections of these statutes which extend these remedies to the legal representatives of the deceased. But in these provinces similar enactments are in force to those of England and the other provinces comprising the confederation.

Perhaps the most important qualification of the common law rule in this respect was effected by the measure known as Lord Campbell's Act, that was passed in A.D. 1846, and appears to have been suggested by the law of Scotland, which already gave a similar remedy. It is entitled "An Act for compensating the families of persons killed by accident," and is cited as 9 & 10 Vict. cap. 93. It was amended in 1864 by 27 & 28 Vict. cap. 95.

The principal Act gives a right of action to the personal representatives of a person whose death has been caused by a wrongful act, neglect, or default, such that if death had not ensued, that person might have maintained an action; but the right conferred is solely for the benefit of the wife, husband, parent, and child. In default of the representatives suing within six months, the amending Act confers that privilege on the persons named for whose benefit the action can be instituted.

In *Leggott v. Great Northern Railway Co.* (s) Mr. Justice Quain, at p. 606, speaking of this Act, says: "Now, Lord Campbell's Act gives an entirely new action, not an action connected with the state of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. The Act merely says that the nominal person to bring the action on behalf of certain relations, . . . shall be the executor or the administrator. It is plain, therefore, that an action brought by the person designated by the statute is brought in an entirely different right from that in which the action is brought

(s) 1 Q. B. D. 599.

by the executors generally as representing the estate of the testator or intestate."

In *Seward v. "Vera Cruz"* (t) the Earl of Selborne, Lord High Chancellor of England, also discusses the policy of the Act. At p. 67 of the report that noble and learned Lord says: "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, 'actio personalis moritur cum persona,' because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action, an action which he never could have brought under circumstances which if he had been living would have given him, for an injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways."

In the province of Nova Scotia Lord Campbell's Act is re-enacted in Revised Statutes, 5th series, cap. 116; in New Brunswick in the Consolidated Statutes, cap. 86; in Ontario, Revised Statutes of Ontario 1897 cap. 166; and in Manitoba, cap. 26 of the Revised Statutes there. It is also law in the other provinces of Canada, except Quebec, where the Code based on the Code Napoleon prevails.

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And now I have concluded my review of the most important phases of the law embodied in this maxim. It is indeed inadequate to my own wishes, but any deficiency must in greater part be attributable to the want of materials accessible to me in the general law libraries here, than to any unwillingness to contribute the full quota of one's energy to make it as complete as possible. A subject like this from its very nature cannot be treated with any degree

(t) 10 App. Cas. 59.

of practical success with that originality, nor subjected to that criticism, which one would expect to find in a composition of this kind. All that I profess to have done is to have shown an acquaintance with and an understanding of the subject consistent with that knowledge which every lawyer should acquire in order to entitle himself to the confidence properly reposed in members of the profession of law. In doing that I have endeavoured to ascertain its origin and history; to illustrate its primary application in contract and in tort; and afterwards to amplify the modifications and exceptions that have been engrafted from time to time by the Courts and Legislature on this great and governing principle of our jurisprudence. Whether or not I have succeeded in my undertaking, while conscious of its many imperfections, I confidently leave to the opinion and candour of those who are to pass judgment on it.

JOHN J. POWER.

Halifax.

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## EDITORIAL REVIEW.

**Interpretation of General Rules.**

In two recent cases the Courts of this province seem to have found difficulty in interpreting General Rules. Rule 159 of the present consolidation relates to service of original process on defendant corporations. Most of its provisions were originally contained in section 33 of the Common Law Procedure Act of 1856. It provides for service upon the mayor, warden, reeve, president, or other head officer, or on the cashier, treasurer or secretary, clerk or agent of the corporation, and then goes on to say—"And every person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid, be deemed the agent thereof." It is these last words that have occasioned difficulty, and a remarkable difference of opinion, in *Murphy v. Phoenix Bridge Company*, 18 P. R. 406, 495. The question was whether one William Kelly, on whom the writ was served, and who was a paymaster employed by the Phoenix Bridge Company, a foreign corporation, was an agent carrying on the business or part of the business of the company in this province. The Master in Chambers allowed the service; his order was reversed by the Chief Justice of the Common Pleas, restored by a Divisional Court, and again reversed by the Court of Appeal, whose interpretation of the Rule as given by Mr. Justice Osler is "that the words 'and every person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Ontario,' are to be read in the light of the words which precede them when dealing with corporations within the province, and which, applying to them the rule *ejusdem generis*, clearly demand service upon some chief or principal officer, whose knowledge would be that of the corporation.

. . . What is meant by 'a person who transacts or carries



on any of the business of, and any business for, any corporation,' is, at the least, some person who is an agent of the corporation, who transacts or carries on here, or controls or manages for them here, some part of the business which the corporation profess to do and for which they were incorporated." The defendant company was incorporated for the purpose of building bridges, and therefore did not come within the provisions of Rule 160, authorizing a particular mode of service in the case of railway, telegraph, and express companies, in regard to which the decision of the Court of Appeal in *Tytler v. Canadian Pacific Railway Company*, 18 Occ. N. 269, may be referred to.

The other Rule of Court which has recently given rise to discussion is 1198, as to security for costs, or rather the new part of it (*b*), which enacts that security for costs may be ordered "where the plaintiff is ordinarily resident out of Ontario, though he is temporarily resident within Ontario. The difficulty of defining "ordinarily resident" and "temporarily resident" is obvious, but in *Denier v. Marks*, 18 P. R. 465, the difficulty was increased by the circumstance that the plaintiff was professionally a wanderer—a strolling player, without any home. The result of the case is hardly satisfactory. The Divisional Court was composed of two Judges, who did not entirely agree as to the construction of the Rule, and it cannot be said that more was decided than that the plaintiff was not a person ordinarily resident out of Ontario.

#### **Ye Barristers of England.**

Ye Barristers of England  
Who guard our hearths and homes,  
Whose learning is entombed within  
A thousand mighty tomes;  
Your ponderous briefs unfold again,  
Now that vacation's o'er,  
And rant—yes, and cant—  
While the jury loudly snore;  
While you argue cases loud and long,  
And the jury loudly snore.

The case-law of your fathers  
Starts up on every side;  
The Bench, it was their field of fame,  
And precedent their guide.  
Where Coke and mighty Blackstone sat,  
You, perhaps, may sit some day,  
If ye rant—yes, and cant—  
While the jury snore away;  
If ye argue cases loud and long,  
While the jury snore away.

Britannia needs no bulwark  
While she her Bar supports;  
Her pride is in the jury-box  
Her home is in the Courts.  
The thunders from her native Bar  
Resound from shore to shore  
As they roar, evermore,  
While the jury loudly snore;  
While they argue cases loud and long,  
And the jury loudly snore.

The Parliament of England  
May yet, terrific, turn,  
And put an end to bills of costs  
And all your law-books burn.  
Then, then, ye zealous Barristers,  
Your words shall cease to flow,  
And your name lose its fame.  
While the jury homeward go:  
And the fiery speech is heard no more,  
And the jury homeward go.

# THE CANADIAN LAW TIMES.

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OCTOBER, 1899.

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## ADVERSE POSSESSION—A REVIEW OF NEW BRUNSWICK CASES.

IT is proposed in this article to group in chronological order all the leading cases relating to adverse possession which have passed under the revision of the Supreme Court of New Brunswick. The first which deals with this branch of the law is that of *Doe dem. Thomson et ux. v. Barnes*, 1839 (a). This action was commenced before the passing of the New Brunswick statute 6 Wm. IV. cap. 43, being a transcript of the English statute 3 & 4 Wm. IV. cap. 27, intituled an Act for the limitation of actions and suits relating to real property and for simplifying the remedies for trying the rights thereto. *Thomson v. Barnes* follows *Taylor d. Atkyns v. Horde* (b) in respect that no estate passes if at the time of the execution of the deed of conveyance the grantor is actually disseised thereof; and that when descent is cast the right of possession is in the heir of the disseisor. Chief Justice Chipman in his judgment thus defines disseisin, adopting the words of Kent, C., who followed Lord Coke:—"Every disseisin is a trespass, but every trespass is not a disseisin. A manifest intention to oust the real owner must clearly appear in order to raise an act which may be only a trespass to the bad eminence of a disseisin." He further observed "that the doctrine of disseisin, as it creates estate by wrong, should be taken strictly, and the facts which constitute it should be clearly made out, and no

(a) *Berton's Reports, Stockton's Notes*, p. 633.

(b) 1 Burr. 60.

presumption be admitted in favour of it; but, on the contrary, that every legal presumption will be in favour of the rightful title."

The case of Doe dem. Kimpson v. Croft, 1842 (c), decided that a grant from the Crown, of itself carrying livery of seisin, should be deemed to have put the grantee in possession of the land granted to him; that his possession would *prima facie* be deemed to continue while the land remained unoccupied and unimproved; and that no interruption of possession or act of abandonment having taken place, so as to work either a dispossession or a discontinuance of possession, twenty years before action brought, the right of entry would remain. It must be borne in mind that this decision was after the Act of the New Brunswick Legislature 6 Wm. IV. cap. 43, which came into operation on the 1st of January, 1837.

Des Barres v. White, 1842 (d), was the first case in New Brunswick in which the question of what constitutes adverse possession of wilderness lands was brought under the consideration of the Supreme Court. The Courts of Westminster afforded no assistance, there being no precedents on this particular branch of the law. The various tribunals of the United States, however, furnished many decisions upon a question particularly within the range of experience of a new and unsettled country. Many of the States had adopted the Statute of James I., and others had local statutes passed after the English model.

In Des Barres v. White the plaintiff claimed as surviving devisee in fee of his father, who was grantee under the Crown of the locus in quo, which was wilderness land in the rear of the enclosure occupied by the defendant. The defence relied upon was adverse possession of twenty years under the Statute of Limitations. It was admitted that the defendant could hold the part enclosed of the lot granted to the father of the lessor of the plaintiff, although part of the same grant, since he had cultivated and enclosed it for a time sufficiently long to bar the plaintiff's right of recovery. The land in dispute was unenclosed. The rear line had

(c) 1 Kerr 546.

(d) 1 Kerr 595.

never been defined, nor had the side lines been run. The defendant for over twenty years had cut his poles and firewood upon this wilderness land, and was constantly encroaching upon it by his clearings, at the rear of his enclosure. On the trial Carter, J., instructed the jury that the plaintiff had shown sufficient title to recover, unless it was answered by the defendant's title of adverse possession of the locus in quo more than twenty years; that he did not consider it necessary to constitute an adverse holding, that the defendant should have had the same enclosed by a fence, or that the lines should have been run; it was sufficient if he had occupied by such continuous acts of possession as usually constitute a possession by an owner; and if they found that the defendant had had such possession of the whole of the lot, it was a sufficient defence to the action; it was for the jury to say whether the defendant did not occupy the whole in the way in which wilderness land was capable of being occupied, viz., by cutting wood, poles, etc. Under this direction the jury found a verdict for the defendant. The Court, on motion for a new trial, laid down the law substantially as follows:—Where the claimant relies upon holding adversely under the statute, he must show, if he did not enter upon the land under colour of title by deed or other written instrument, that he intended, when he entered, to hold possession as against the world; that his holding was open, exclusive, and hostile; that his acts and dealing with the land were such as to afford knowledge to the owner of his intention, or that they were so continuous or notorious, that he could not be presumed to be ignorant thereof; that it was without interruption on his part or those through whom he claimed; that since every intendment was in favour of the lawful owner, and, as the scope and aim of the law was to protect every man in the enjoyment of his rights and to suppress wrong-doing, the evidence must be strong, clear, and convincing on all these points; and that such a claim could only ripen into a valid title of so much of the soil as the claimant evinced an intention to hold, by defining by marks and bounds upon the land itself, or by actually enclosing the same with a fence or fences. In applying the foregoing principles to the case under consideration, the Court

observed: There is no proof of entry under claim of colour of title; the enclosure, which would appear to have been extended from time to time, never went beyond the improved parts not in controversy; that the direct evidence of cutting by the defendant on the rear more than twenty years ago was slight, and the limits of the supposed possession on the sides and at the rear were very vague; and that there was not even the ordinary evidence of the defendant claiming according to the metes and bounds of a lot as described in the original grant. The Court, in reaching its decision, seems to have adopted the doctrine as laid down by Tillinghast in his edition of Adams on Ejectment, p. 579: "An adverse possession must be hostile in its inception; must be marked by definite boundaries; must be an actual occupancy, positive, notorious, uninterrupted, and continued for the space required by the Statute of Limitations, in order to toll entry."

In 1857 the Court held in *Doe dem. Blair v. Chace* (e) that a grantee of land is deemed to be in possession while the land remains unimproved and unoccupied, and that when a party enters upon it without title his seisin is confined to his possession by metes and bounds, following *Doe dem. Kimpson v. Croft* (f).

The next case in which this question passed under review was that of *The Mayor of Saint John v. Littlehale* (g), decided in 1861. The defendant claimed to hold by adverse possession of twenty years a piece of land between high and low water mark, in front of a lot owned by him. He based his claim upon the fact that he had, for over twenty years, landed his boats at the shore, both at low and high water; had passed over the beach to and from his boats, when the tide was out; and had used the locus in quo for drawing seines and as a place for drying fish. The soil of the harbour by Act of Assembly is in the city. Wilmot, J., directed the jury that no continuous adverse possession had been proved; that the continuity of possession had been broken with every flow of the tide; that when the tide was in, the place in question

(e) 3 Allen 501.

(f) 1 Kerr 546.

(g) 5 Allen 121.

was a public highway, over which every person had a right to pass; consequently the defendant could have no exclusive possession. Under this charge the jury found for the plaintiff. On appeal Chief Justice Carter, in delivering judgment discharging the rule, on motion for a new trial, enunciated the following rules: To succeed in a claim of title by adverse possession, the defendant must prove that he had appropriated to himself for a period of twenty years the exclusive possession of a particular definite portion of land; that the person having the legal title must have had notice that possession had been taken hostile to his title, or such acts done as would be sufficient to put him on his guard for its protection; that since such possession was exclusive, hostile, had its inception in wrong and was in derogation of right, it should be established by the clearest and most unequivocal testimony as against the legal title.

*Humphreys v. Helmes* (*h*), decided the same year, demands more than passing notice, not less on account of the importance of the question involved, than from the fact that the judgment of the Court, a divided one, has been generally regarded by the profession as very unsatisfactory. The origin of the plaintiff's title was a deed from Henry Helmes, who, without right or authority, professed to convey to one Joseph Baxter the lot in question, No. 33, which had been granted to his son, William Helmes, in 1812. William Helmes, at the time the grant issued to him, was a minor, and shortly afterwards left the province. The deed of the lot made by his father to Baxter was registered in 1813. In 1825 Baxter, without having entered, executed a deed of bargain and sale of it to John King and William Fairweather, which was registered in 1826. King and Fairweather carried on lumbering operations upon it one or two winters, and in 1828 conveyed it to George Fairweather, who cut lumber and made shingles on it during one season. In 1834 Fairweather conveyed it to the plaintiff. All these conveyances were duly registered. Up to this time the lot remained in a wilderness state. The plaintiff entered under said deed in 1836 and commenced to build a house, which, however, was

(*h*) 5 Allen 59.

shortly afterwards burned down. The land remained unoccupied until 1850, when the plaintiff built another house. The defendant, a brother of the original grantee, entered upon it and cut some trees, for which act of alleged trespass this action was brought. At the trial it was admitted that, unless the registered deeds operated as a disseisin, the plaintiff had not made out a title, there being no such actual, continuous, and exclusive ownership as would operate as a disseisin of the true owner. Mr. Justice Ritchie told the jury:—"He thought the deeds in evidence were material elements or ingredients to be taken into consideration by them in determining the character of the acts alleged to constitute a possession of the land by the plaintiff and those under whom the plaintiff claimed. That if a party entered on land under a registered deed, with defined boundaries, and exercised acts of ownership, and afterwards conveyed the land to a second party by a deed duly registered, such possession would enure to the benefit of the grantee, inasmuch as the Act of Assembly made a registered deed tantamount to livery of seisin, and if that grantee in like manner continued in possession by himself or his grantees, under registered deeds, for a period of twenty years, a jury might find such a continuous possession as would bar the right of the owner of the land. . . . That if the plaintiff and those under whom the plaintiff claimed entered under their deeds with the intention of taking possession as owners, and continued to use the land, and exercise such acts of ownership over it as persons having the legal title might be expected to do, having reference to the character of the land, whether wilderness or improved land, they might find that such acts were continuous acts of possession of the whole lot, and if continued for twenty years would bar the right of Samuel Helmes, and entitle the plaintiff to recover; whereas, if they entered without deed or claim of property, the same acts might be no more than isolated acts of trespass, and at any rate would not be extended beyond the actual occupation. A verdict, under this charge, was returned for the plaintiff. On motion for a new trial, it was strenuously contended that there was no such continuous actual occupation of the land as would amount to a disseisin of the heir. A



possession taken in 1836, and abandoned in 1838, could not operate as a disseisin of the true owner, and unless the registered deeds operated as a disseisin, the plaintiff had made out no title. That a deed from Henry Helmes, who had no title and who had never been in possession, passed nothing. That Baxter acquired no title and could convey none. That King and Fairweather were mere trespassers. That the continuity of the possession, if any, was broken by the entry of the defendant, who, it seems, entered in 1836 and claimed the property. To countervail the legal title, there must be twenty years of actual occupancy or substantial enclosure of the premises. That if a party enters without title, his seisin is confined to his possession by metes and bounds. That there was no difference between an entry without title and an entry under a deed which gave no title." The rule for a new trial was discharged by Justices Wilmot, Ritchie, and Robert Parker: N. Parker, M.R., and Chief Justice Carter dissentientibus. The judgment of N. Parker, M.R., seems unanswerable. He said: "This is not a conflict between two possessions, where neither party can claim except by possession; but in this case it is an indisputable fact that the defendant Samuel Helmes was the heir of the grantee of lot No. 33, whereof the locus in quo is a part; it, therefore, presents a very important question affecting the titles to land in this province. It appears that in 1809 two adjoining lots were severally granted to Henry Helmes and his son William. They were surveyed for them about the same time, or within a year of the grant. Both father and son were present at the survey. The right of the Crown, at the time, to grant, is not disputed, and the effect of that grant, upon well-established principles of law which have been expressly recognized in this province, was to invest the father and son, severally, with the seisin of their respective lots. By this grant, and without further act on his part, William Helmes became, in the eye of the law, as against all the world, as fully in possession of lot No. 33, which was then in wilderness, and of every part thereof, according to and up to the bounds of his grant, as if he had cleared and cultivated and substantially fenced the whole. If any timber were thenceforth cut or other

depredation committed on this lot, he would be entitled to the action of trespass for the injury to his possession, in like manner as for an injury to his cultivated field, and to exercise every other right of ownership. . . . In the total absence of any English authority recognizing such an effect as is contended for of a registered deed, and with the recollection that registry is there held not to be notice, I think there was nothing here established, in the desultory, partial, and unconnected acts proved, notwithstanding the registry of the deed, to oust the title of William Helmes and his heirs; and that, therefore, the rule should be made absolute."

The majority of the Court were doubtless influenced by the Nova Scotia case, *Cunard v. Irvine* (i), decided in 1853, in which it was held that a party claiming wild lands under a deed, and having actual possession of a part, has a sufficient constructive possession of the whole land, where he entered under a claim of title, to bring him within the Statute of Limitations. Chief Justice Haliburton, in the course of his judgment, said:—"A mere intruder gains no more under the statute than what he has actually occupied adversely for twenty years. This is the law both in this province and the United States. But where a party enters under a colour of title, the law is different there, and I deem it to be so here also." The learned Chief Justice then proceeds to quote with approval the rule laid down by Mr. Justice Story: "We took it to be a clear principle of law that where a person enters into land under a claim of title thereto, by a *recorded* deed, his entry and possession are referred to such title, and he is deemed to have a seisin of the land co-extensive with the boundaries in his deed, where there is no open adverse possession of any part of the land, so described, in any other person." Chief Justice Carter, in *Humphreys v. Helmes*, thus refers to *Cunard v. Irvine*:—"In the case of *Cunard v. Irvine*, in the Supreme Court of Nova Scotia, the doctrine contended for is certainly clearly maintained by the venerable Chief Justice Haliburton; but, I must say, maintained by arguments and authorities which

(i) James 31.

fail to bring conviction to my mind. Nor was that doctrine necessary for the decision of the case, which turned on the insufficiency of the plaintiff's title, and not on that of the defendant's."

In *Smith v. Morrow* (*j*) it was held that isolated acts of trespass on the lands of the Crown, without visible limit or clearly apparent bounds, even if continued for a period of twenty years, would not prevent a grant issued by the Crown from taking effect, without office found. Yet if there was evidence of continuous acts of prior possession of the land, adverse to the Crown for twenty years, before the grant issued, such evidence should be left to the jury; but in order to prevent a Crown grant from taking effect on that ground, the possession should be defined, actual, and continuous.

In so far as *Humphreys v. Helmes* is supposed to adopt the American rule to its full extent, it is overruled by *Van Buskirk v. Carney* (*k*), 1874, wherein it was held that the constructive possession which a party holding under a registered deed, describing a lot of land by metes and bounds, has of the whole lot is not sufficient to give him the title to any portion against one who has had for a lengthened period the actual and continuous possession. When the counsel moving for a new trial in the latter case, pressed home upon the Court the doctrine laid down in *Humphreys v. Helmes*, Chief Justice Ritchie thus attempted to break the force of his argument:—"That case has frequently been misquoted, and, in the note in *Stevens' Digest*, I am unfortunately put down as having gone to as great a length as the American decisions, while I have never yet been called on to express a decided opinion on the point."

In his judgment discharging the rule Chief Justice Ritchie said:—"It is contended that the jury were misdirected in this case, inasmuch as the lessor of the plaintiff, having gone into possession under a registered deed, had a constructive possession of the whole of the land described therein; and in support of this position the case of *Humphreys v. Helmas* was cited. It was argued in that case, as in the

(*j*) 1 Pugsley 200.

(*k*) 2 Pugsley 233.

present, that where a party went into possession of any portions of a lot of land, under a registered deed describing the land by metes and bounds, such possession was to be considered as an actual possession of the whole of the land within the bounds set out in his deed. I tried that case, and I did not deem it necessary for its decision to affirm that proposition to its full extent."

Notwithstanding this disclaimer on the part of the Chief Justice, it is pretty generally considered by the profession that he did affirm that proposition to a partial extent; or, at least, it is difficult to ascertain to what limitations he subjected the American doctrine.

The subject underwent careful consideration in the case of *Sherren v. Pearson* (l), 1887, on appeal from the Supreme Court of Prince Edward Island. Chief Justice Ritchie, quoting extensively from the judgments of Parker and Carter, JJ., in *Des Barres v. White* (m), remarked as follows:—"I have cited this case at greater length than I otherwise should have done, because it has ever since been regarded and acted on as enunciating the correct principles in reference to the possession of wilderness lands. To interfere in any way with this case, or to cast any doubt on it, after it has been accepted and acted on as good law for forty-two years, would be to unsettle the jurisprudence of New Brunswick, and, as I understand, of the other Maritime Provinces, on this subject, and lead to litigation and confusion."

*Doe dem. Savoy v. Savoy* (n) is an interesting case, as the defendant grounded his defence on claim of title. The plaintiff in ejectment claimed under the will of his father, who lived on the land at the time of his death. The defendant, a brother of the plaintiff, claimed to have gone into possession under a verbal gift from him, more than twenty years before his death, when he was a minor, and that he had during that time occupied the land as owner. Verdict passed to the defendant. Held, on motion for new trial,

(l) 14 S. C. R. 581.

(m) 1 Kerr 595.

(n) 28 N. B. Reps. 168.

that it would be presumed that the legal possession of the land was in the father at the time of his death, and that the proper questions for the jury were: whether he had given up the possession and control of the property to the defendant more than twenty years before his death, with the intention that the defendant should then become the absolute owner of it; and whether the defendant had been in exclusive possession of it, claiming it as his own by his father's consent, for twenty years before action brought.

In *Foley v. Foley* (o), 1890, the Court declined to follow the rule as laid down in *Humphreys v. Helmes* (p), apart from the interpretation put upon it by the Chief Justice in *Van Buskirk v. Carnay* (q). In *Foley v. Foley* the plaintiff in trespass relied upon actual possession for fourteen years of the part of the land where the alleged trespass was committed. The defendant claimed, under colour of title through a deed from one Robert McCalmont and others to his father, executed by George Kerr, attorney of the grantors, the lot which included the locus in quo. There was no proof of the power of attorney to Kerr; nor did he trace his title beyond the deed to his father. His father devised by will the lot to the defendant. He grounded his defence on actual possession, for more than twenty years, of the front part of the lot, and constructive possession of the whole under colour of title; but no actual possession of that part of it where the alleged trespass was committed. The jury found for the defendant. Sir John C. Allen, C.J., in delivering judgment granting a new trial, held that fourteen years' possession by the plaintiff of the particular part of the land where the alleged trespass was committed was sufficient to entitle him to recover in trespass against a person who did not prove title, citing in support thereof *Hodgson v. Carr* (r).

The following rules seem deducible from the cases referred to:—

(o) 30 N. B. Reps. 68.

(p) 5 Allen 59.

(q) 2 Pugsley 233.

(r) 3 Kerr 499.

1. That a Crown grant of wilderness land passes the seisin to the grantee without entry, and he holds by virtue of his grant to the full extent of the boundaries thereof.

2. To gain title by adverse possession, there must be an intention evidenced by overt acts to oust the owner and bar his legal title; and there must be sufficient of these acts to show this intention before the statute begins to run.

3. There must be actual as contrasted with constructive possession—such as occupation, residence, cultivation, and enclosure. The possession, however, need not be personal; it may be by agent or tenant.

4. The possession must be hostile or adverse, in the modern sense of the term, adopted since the passage of the Act 3 & 4 Wm. IV. cap. 27, of which the New Brunswick Act 6 Wm. IV. cap. 43 is a copy.

The acts of adverse possession must be of such a character as to operate as constructive notice to all the world of the claim under which the possessor holds, and such that the legal owner will be presumed to have notice of it and its extent. Consequently, the possession must be visible, notorious, exclusive, and hostile.

5. The possession must be continuously adverse, during all the time fixed by the statute. Disconnected trespasses, however long continued, such as cutting fire-wood, poles, stripping bark, running lines, and marking trees, etc., will not constitute such a possession as will ripen into a title.

6. To hold by adverse possession only as against the legal title, there must be a substantial enclosure, a *possessio pedis*, definite, notorious, and continuous.

7. Where a party enters even under a claim of right, or ownership, the ouster extends no further than the enclosure of the disseisor.

8. Under the American decisions, if a party enter under colour of title, his possession extends to the full limits of the metes and bounds described in the instrument, deed, or writing, purporting to convey the land. By colour of title is meant that which in appearance is title, but which in reality

is no title. To constitute colour of title one must have a paper title. A claim of title may exist wholly by parol.

It is true a majority of the New Brunswick Court in *Humphreys v. Helmes*(s) held that one who entered under colour of title and made improvements and built a house, took constructive possession of the lot described in the instrument of conveyance; yet this doctrine can no longer be regarded as giving a safe rule.

SILAS ALWARD.

St. John, N.B.

(s) 5 Allen 59.

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## HIRED VEHICLES AND THE RELATION OF MASTER AND SERVANT.

It is the purpose of this article to consider how, if at all, the general law of master and servant is affected by the fact of the servant being in charge of a vehicle and horse, or either, which are owned by another person than his master. A careful study of the English cases will disclose a rule for guidance in the complexity of facts which may arise.

*Quarman v. Burnett* (a), a case decided in 1840, may be taken as a starting point; the only case of importance previous to it being *Laugher v. Pointer* (b), where an equal difference of opinion between the Judges left the point undecided; and the Court of Exchequer had in *Quarman v. Burnett* to decide between the different opinions therein expressed.

*Quarman v. Burnett* was an action for damages for injuries caused by a carriage colliding with the plaintiff's, and he made defendants two old ladies who owned the carriage but hired the horses and driver. It was held that the relation of master and servant did not exist between the old ladies and the man who drove their carriage. The judgment of the Court, delivered by Baron Parke, is not a very luminous statement, but, as he adopted the judgment of Mr. Justice Littledale in *Laugher v. Pointer*, where the facts were exactly similar, we may turn to that case for instruction.

In *Laugher v. Pointer* Mr. Justice Littledale stated that the rule of the liability of a master for the acts of his servants extends beyond domestic servants, "to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master." That is, the jobman was liable for the acts of the driver whom he hired out. He then turns to consider the question of liability from the hirer's point of

(a) 9 L. J. Ex. 308.

(b) 5 B. & C. 547.



view. "This, however," he says, "is not the case of a man employing his own immediate servants, either domestic servants or other, engaged by him to conduct any business, or employment, or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. The coachman was not hired to the defendant;" (would it not have been more correct to say: the coachman did not hire *himself* out to the defendant?) "he had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman." And the learned Judge goes on to point out that the fact that the driver was paid by a gratuity from the person whom he drove, and received no wages from his master, did not affect the relationship of master and servant, because he was, like servants in many hotels, "a servant upon expectation of gratuities."

Then the judgment, having determined where the true relationship of master and servant lay, goes on: "It may be said that the traveller is liable also" (i.e., as well as the master of the driver). "I think not. The coachman or postilion cannot be the servant of both. . . . If they are jointly liable you may sue either, but you cannot have two separately liable; you must bring your action either against the principal or the person who commits the injury." And *Stone v. Cartwright* (c) is quoted as the authority here; in which case Lord Kenyon said, "you may bring your action against the hand committing the injury;" which would be the driver in the case under consideration.

*Quarman v. Burnett* was followed in *Jones v. Liverpool Corporation* (d), where the circumstances were precisely similar.

The next case to be considered is *Englehart v. Farrant* (e), important if only because it came before the Court of Appeal. The plaintiff's carriage was injured by a delivery cart, and he brought his action against *Farrant & Co.*, who

(c) 6 T. R. 411.

(d) 54 L. J. Q. B. 345.

(e) 66 L. J. Q. B. 122.

provided the horses and driver, the other defendant being Lipton, the well-known grocery man, who supplied the cart, and the damage was done while the cart was being used in Lipton's business. The County Court Judge held that the driver was the servant of Lipton, and gave judgment against the defendant Lipton and in favour of the defendants Farrant & Co. The Court of Appeal affirmed the judgment of the County Court Judge. The curious feature of this case was that the argument before the Court of Appeal was on the point of the intervention by a third party; and it appears to have been admitted by counsel at the bar, and was certainly taken for granted by all the Judges, that the driver was the servant of Lipton. It is impossible to reconcile any such admission with the decision in *Quarman v. Burnett*; the circumstances were, as far as regards the relation of master and servant, identical; in both cases the vehicle was owned by the defendant, and the horse and driver were supplied by other persons. Whatever the explanation be, the question before the Court was on another point, and, therefore we may dismiss *Englehart v. Farrant* as having no bearing upon the question under discussion.

The last case for consideration is *Jones v. Scullard* (f). Here the plaintiff brought his action for negligence against the defendant who owned a brougham and horse but hired the driver, and it was held by Lord Russell, C.J., that the defendant was liable for the acts of the driver. The ownership of the horse is the only circumstance that differentiates this case from *Quarman v. Burnett*. There the defendants owned the carriage only. Here the defendant owned the horse as well. The decision rested on that distinction. The damage was caused by the horse bolting. The Lord Chief Justice treated the horse as an active agent which participated in the service, which shared the same with the driver, and which threw the blame on his master by vicious conduct beyond the control of the human servant of another master.

These cases supply us with sound and intelligible principles. There are three persons; the master, the driver, and the owner or hirer.

(f) 67 L. J. Q. B. 895.

If the damage is caused by the negligence of the driver, whose master directs him to perform the particular service for the owner of the horse, or the vehicle, or both, then the relation of master and servant does not arise between the driver and the owner, and the owner of the horse or vehicle is not liable.

If, on the other hand, the damage is caused by the vice or want of training of the horse, and the horse belongs to the person for whom the driver is performing the particular service, then the relation of master and servant is held to arise between the driver and the owner, and the owner of the horse is held liable as if the act were the act of the driver and the driver were his servant.

And, if the horse is the property of the master of the driver, or if horse, driver, and vehicle are all hired out, then the relation of master and servant does not exist between the driver and the owner or hirer; and the owner of the vehicle, or the hirer, is not liable for either the negligence of the driver or the vice of the horse.

The question of the liability of the owner of a motor car who hires the driver from his master is likely soon to arise. If the principles suggested above are correct, the owner should be held liable for accident caused by a fault in the mechanism of his motor car, just as if it were the vice of his horse, and the relation of master and servant will arise between the owner and the driver. But if the damage is caused by the negligence of the driver, the relation of master and servant should not be held to arise between the owner and the driver.

A. R. COLLES.

Calgary, N.W.T.

[See the recent case of *Caston v. Consolidated Plate Glass Co.*, 26 A. R. 63, 29 S. C. R. 624.—ED.]

## EDITORIAL REVIEW.

**Disfranchisement of Municipal Voters.**

A construction has been placed upon the words of section 204 of the Municipal Act by the judgment of a Divisional Court delivered by Mr. Justice Street in *In re Young and Township of Binbrook*, noted in this number of the Occasional Notes, at p. 335. It seems that in voting upon a local option by-law two classes of the rightful electors, farmers' sons and income voters, were disfranchised by the error of the township clerk, who left their names off the lists furnished to the deputy returning officers. If, however, all these persons had voted against the by-law, there would still have been a majority in its favour. Section 204 operates to prevent such a by-law being quashed if the election was conducted in accordance with the principles laid down in the Act, and if the irregularity did not affect the result. "An election," says the Court, "should be held to have been conducted in accordance with the principles laid down in the Act, when the directions of the Act have not been intentionally violated, and when there is no ground for believing that the unintentional violation of them has affected the result." Counsel for the person applying to quash the by-law had presented the formidable argument that the result might have been, and probably was, affected, beyond the actual votes of the disfranchised, by the operation of the error upon the minds of those whose names were on the list, who might, for example, have voted for the by-law or abstained from voting against it because they deemed that, in the condition of the list, opposition was hopeless. This suggestion the Court declined to entertain, in the absence of any evidence to shew that any votes were affected in that way; and held the by-law saved by virtue of the section. This case, at first sight, appears to resemble that of *In re Pounder and Village of Winchester*, 19 A. R. 684, where

also a class of electors was disfranchised, and where the by-law was in consequence quashed. But the resemblance is superficial; the decision in that case did not turn upon what is now section 204; upon the figures there the result may certainly be supposed to have been affected by the irregularity, for, had all the disfranchised persons voted against the by-law, it would have been defeated. In the present case the Divisional Court has given a broad interpretation to the remedial section. The only doubt is whether the onus is properly on the applicant to shew that the result was affected by the irregularity. See *In re Pickett and Township of Wainfleet*, 28 O. R. 464, 17 Occ. N. 235.

#### **Imprisonment for Debt.**

The law of Scotland, in the early part of the century, if Sir Walter Scott is not misleading us, seems to have anticipated our own Division Court procedure (see R. S. O. cap. 60, sec. 247) with some nicety. "It is a remarkable thing that in this happy country no man can be imprisoned for debt. . . . The truth is, the king is so good as to interfere at the request of the creditor, and to send the debtor his royal command to do him justice within a certain time. Well, the man resists and disobeys: what follows? Why, that he is lawfully and rightfully declared a rebel to our gracious sovereign, whose command he has disobeyed. . . . And he is then legally imprisoned, not on account of any civil debt, but because of his ungrateful contempt of the royal mandate:" *The Antiquary*, c. 39. Division Court judgment debtors in these modern days will be inclined to remark with Captain Hector McIntyre that "if a man must pay his debt or go to gaol, it signifies but little whether he goes as a debtor or a rebel:" *ib.* And Sir Walter adds in a foot-note: "The doctrine of Monkbarns on the origin of imprisonment for civil debt in Scotland may appear somewhat whimsical, but was referred to, and admitted to be correct, by the Bench of the Supreme Scottish Court, on the 5th December, 1828, in the case of *Thom v. Black*. In fact, the

Scottish law is in this particular more jealous of the personal liberty of the subject than any other code in Europe." "Whimsical" is the right word.

### Referees' Reports.

It seems that some solicitors and local officers of the Courts are finding difficulties in the practice with regard to the reports of referees. It would be well, perhaps, that greater care were taken in the drawing up of judgments and orders which direct a reference. The forms in the Appendix to the Consolidated Rules, Nos. 122 and 123, are explicit enough, but some variation is often necessary from the circumstances of the particular case. Roughly speaking, the orders or judgments may be of two kinds—final and interlocutory. The final order may be according to form 123, when the reference is for trial under sec. 29 of the Arbitration Act, and in that case the report, when confirmed by lapse of time, needs no further order or judgment to make it effective:—"And it is further ordered that the defendant do pay to the plaintiff the amount which the referee shall find to be payable forthwith after the confirmation of the referee's report." When the order does not contain such a direction as this, it should either reserve the question of further directions, or be silent thereon, as in form 122, in both of which cases a motion to the Court is necessary after the report. This is really the logical method of dealing with a "report." The word implies that it is a communication made by the referee to the Court of the result of the inquiry which he was directed to make—and it is probable that misapprehension has arisen from the employing of the word in cases where the reference is for trial and nothing but filing and serving notice is required to be done to make the report effective. We learn that in one case, after confirmation of a report, a judgment for its enforcement was entered in a local office upon *præcipe*; and the impression is general that after report a motion for judgment is in all cases necessary: see Holmsted & Langton's Judicature Act, 2nd ed., p. 812.

**Married Woman's Funeral Expenses.**

That the separate estate of a married woman, deceased, is liable for her funeral expenses has recently been decided by Mr. Justice Rose: *In re Gibbons*, 19 Occ. N. 346. It is believed that the question has not come up before in Ontario, nor in England. But the exact point was decided in *McClellan v. Filson*, 44 Ohio St. 188, the reasoning of which case the learned Judge has adopted. The circumstances in the Gibbons case were perhaps unusual. There was no personal contract between the husband and the undertaker; and no question as to whom credit was given arose. A friend of the deceased made himself responsible to the undertaker, and the issue was between that friend and the administrator of the estate. The question was therefore a simple one, and the conclusion reached is a reasonable one.

**New "Silks."**

The following members of the bar—we are given to understand that they *are* all members of the bar—have been appointed of Her Majesty's Counsel by the Lieutenant-Governor of Ontario:—Walter Barwick, Toronto; Napoleon Antoine Belcourt, Ottawa; Theophilus Henry Alexis Begue, Dundas; William Hodgins Biggar, Belleville; Samuel Clarke Biggs, Toronto; Robert Bird, Woodstock; John Birnie, Collingwood; Thomas Gibbs Blackstock, Toronto; Willoughby Staples Brewster, Brantford; John Murray Clark, Toronto; Charles Wesley Colter, Cayuga; James Craig, Renfrew; James Walter Curry, Toronto; Francis Brown Denton, Toronto; Herbert Hartley Dewart, Toronto; Dennis J. Donahue, St. Thomas; William Murray Douglas, Toronto; William Edwin Dowler, Tilsonburg; Elihu Burritt Edwards, Peterborough; Charles Franklin Farwell, Sault Ste. Marie; Angus William Fraser, Ottawa; James Thompson Garrow, Goderich; William Manly German, Welland; James Morison Glenn, St. Thomas; James Harley, Brantford; Walter S. Herrington, Napanee; Louis Franklin Heyd, Toronto; Charles Joseph Holman, Toronto; Philip Holt, Goderich; Oliver Aiken Howland,

Toronto ; John Bell Jackson, Ingersoll ; Albert Oscar Jeffrey, London ; Francis Robert Latchford, Ottawa ; James Liddell, Cornwall ; George Goldwin Smith Lindsey, Toronto ; James Pitt Mabey, Stratford ; Thomas Talbot Macbeth, London ; William Macdonald, Toronto ; George G. McPherson, Stratford ; Herbert Macdonald Mowat, Toronto ; Elias Talbot Malone, Toronto ; Wallace Nesbitt, Toronto ; Henry O'Brien, Toronto ; James Redmond O'Reilly, Prescott ; Thomas Hunter Purdom, London ; John Brown Rankin, Chatham ; Edmund John Reynolds, Brockville ; William Renwick Riddell, Toronto ; William Roaf, Toronto ; John J. Scott, Hamilton ; David Burke Simpson, Bowmanville ; George Lynch-Staunton, Hamilton ; William Armstrong Stratton, Peterborough ; Robert Franklin Sutherland, Windsor ; Alexander Stuart, Glencoe ; John Archibald Walker, Chatham ; S. Frederick Washington, Hamilton ; John Lanyon Whiting, Kingston.

The list should have been much larger or else much smaller. It is difficult to conceive on what principle such a "slate" is made up. There are 58 names upon it. Four of the gentlemen may be said to be prominent at the bar. There are eight or nine others who are in some sense doing a "counsel business," that is to say, they more or less frequently hold the briefs of solicitors outside their own firms. The selection of these gentlemen is easily understood, though we could suggest many others of equal reputation in the same line, and some of the elect might well have waited a few years. It is bewildering to try to guess why the remaining 45 were selected. Many of them are excellent lawyers and good citizens, but so are some hundreds of others throughout the Province. The conundrum is one that "no fellow can find out."



## BOOK NOTICE.

THE ONTARIO GAME AND FISHING LAWS, a Digest of the whole Law, Provincial and Dominion, with references to the various statutes and orders-in-council in force on the 18th September, 1899, by A. H. O'Brien, M.A., Barrister-at-law; 4th ed., issued under the authority of the Ontario Fish and Game Department: Ottawa: The Ottawa Despatch & Agency Co., Limited.

## CORRESPONDENCE.

## "Touting."

*To the Editor of the Canadian Law Times:*

SIR,—Until just recently I owned a farm up in ——— and as my name appeared upon the assessment roll up there as owning property near———, the enclosed document went there to my address. As it is quite a novelty for a legal firm to get out, I thought perhaps you would like to see it, as editors are usually looking for something highly edifying, that they may give their subscribers the benefit of genius wherever it is discovered.

Yours truly,

X. Y. Z.

———, ——— & ———,


Barristers, Solicitors in the High Court of Justice,  
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# THE CANADIAN LAW TIMES.

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NOVEMBER, 1899.

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## LEGAL EDUCATION IN CANADA.

*(A Paper read before the Legal Education Section of the American Bar Association, 28th August, 1899.)*

**A**N English poet laureate has told us that:

The thoughts of men are widened with the process of the suns.

This is evidenced by the intelligent and widespread interest taken in our day by all inquiring minds in manifold questions and matters extraneous to those with which they are immediately concerned.

This spirit of mental activity and research which has led to an examination and comparison of facts, principles, and methods in all other sciences, pervades no less the science of law. There is no science in which it may be more worthily displayed.

I can conceive of no conference as to secular matters with higher or better aims than one which has to do with a dissemination of the knowledge of those laws, customs, and rights of men in a state or community which are necessary for the due administration of justice, either national or international.

This is equally true of general jurisprudence, the science or philosophy of positive law, as it is of particular jurisprudence, the knowledge of the law of a particular state or nation.

And, if I may use that generic term again, it is true also of comparative jurisprudence, and of the various phases of

legal education, in the study of which lawyers are of necessity induced to examine the legal systems of countries other than their own, and the methods there pursued in the training of members of their own profession.

I venture to preface what I have to say on the subject of legal education in Canada by a few facts, of which I do not presume that my hearers are ignorant, but for the purpose of showing from the close relationship between the United States and Canada, that the subject of my paper is one not merely of academic but also of practical interest for a gathering such as this.

We are separated from each other by a line which, at many points, is an imaginary one only, and are knit together by many ties, racial, social, and commercial.

The Dominion of Canada, extending about 3,500 miles from east to west, and 1,400 miles from north to south, comprises the whole of the northern half of North America, with the exception, on the west, of Alaska, and on the east, of Labrador, which latter is under the jurisdiction of Newfoundland.

It consists of the following constituent parts: Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, and the North-West Territories.

The latest figures obtainable by me show the annual imports from the United States into Canada to be worth about \$61,000,000, and the exports from Canada to the United States to be worth over \$40,000,000.

The number of Canadians residing in the United States is about one million.

As a result of this proximity and intercourse, cases affecting the property and rights, and sometimes even the liberty and life, of citizens of the United States, are constantly coming up for decision before Canadian Courts.

Under our federal system of Government, which an eminent authority has termed "a monarchical federation," the central or Dominion Parliament has exclusive legislative jurisdiction in matters of common concern to the whole country, including that of criminal law and procedure: while

the local or provincial legislatures have jurisdiction over matters of purely local interest, including those relating to property and civil rights. The provincial authorities have thus supreme control in the matter of legal education.

The English criminal law, modified by provincial statutes, which at the time of Confederation (1867), was in force in all the provinces, has since been superseded to a large extent by the Criminal Code of 1892, a most beneficial enactment, by which the technicalities and sophistries of the English criminal law have been either greatly modified, or entirely swept away.

We are in this respect in advance of the mother country, whose criminal judicature was the prototype of our own; and it can no longer be said of our system, as it was recently said of hers by an English Judge, that "our law unfortunately, instead of being in the form of a code, is a thing of shreds and patches."

With the exception of the Province of Quebec, the English common law, which has been described by one writer as "the most legal system of law in the world," is the basis of the civil jurisprudence of all the provinces, modified, of course, very materially by their own legislation.

The law of the province of Quebec affecting property and civil rights differs, as in fact it always has differed, very materially from that of the rest of the Dominion. It has been one of the peculiar institutions of our French compatriots, and coupled with their language, which it has helped to perpetuate and strengthen, has given the ancient province a unique and distinctive place in our federal system of government.

At the time of the conquest of Canada by Great Britain the *Coutume de Paris*, reinforced where silent (e.g., in regard to obligations and servitudes) by the common law of France, and by the ordinances of the local Governors, was the law in force.

By the proclamation of George III. of the 7th October, 1763, by which the government of Quebec was constituted, embracing the present province of Quebec and the eastern part of Ontario, it was declared that the people were to have

the "enjoyment of the benefit of the laws of England," and the Courts were to decide "all causes according to law and equity, and, as nearly as may be, agreeable to the laws of England."

By the Quebec Act of 1774, the English conquerors restored their old law to the present province of Quebec, and this remained the law of the "new subjects" of the British Crown, until the enactment of the Code Civile of 1865.

This code was largely based upon the Code Napoléon, which, in turn, was mainly derived from the Roman law, Pothier's treatise contributing materially to it, and to the Canadian codification.

It is not surprising, therefore, to find that the study of Roman law forms an important part of the necessary course for all students of the law in the Province of Quebec, that it is in fact a *sine quâ non* for admission to practice at the bar of that province, and that it is also an indispensable part of courses of university education in the faculty of law in all the provinces of Canada in which universities have been established.

Although not strictly within the purview of this paper, a brief reference may be made to legal education as represented by the Canadian universities.

There is a law course in nearly every one of these institutions; the curriculum of subjects is extensive and varied; and the standard of examination is high.

The course for the degree of LL.B., or B.C.L., is usually four years, after the matriculation or entrance examination has been passed; but when a candidate has graduated in arts, the period is shortened to two years in some of the universities, while in others a special examination is set the candidate as a test for his being admitted to a degree.

What is known in several of the universities,—notably in Toronto, Queen's, and Trinity—as the Political Science Department, is intended to afford a means of preparation for the professions of law, the ministry, journalism, and teaching; and the law schools are recruited to a considerable extent from graduates of the universities who have taken the work of that department.

This is true at least of the school with which I have the honour to be connected, about one-half of the students being university graduates, many of whom have been trained in the political science subjects before entering the school.

The political science course embraces an excellent ground work in general and constitutional history, political economy, public international law, jurisprudence, philosophy, public finance, colonial and federal constitutional law, including the constitution and government of the United States, the History of English and Roman law, etc.

And, in one of these universities, that of Toronto—which is a state endowed institution—these subjects are taught and are examined upon, in addition to Roman law, medical jurisprudence, domestic relations, private international law, etc., as well as the law subjects proper which are utilized in the lawyer's active practice of his profession.

The University of Toronto, moreover, accepts the examinations of the Osgoode Hall Law School in certain subjects as equivalent to its own examinations in the same subjects, and admits graduates of that school to a degree in law upon passing two annual examinations in the other subjects of the University curriculum.

The limits of this paper will not permit an enlargement of this topic.

The state university, although more pronounced in the department of political science, is fairly representative of the good work which is being done by other higher schools of learning in Canada along the same line.

The beneficial results of this co-operation in legal education between the university and the law school are already being manifested.

The combination of a liberal academic or collegiate training with the sterner and more practical studies of the school, cannot fail to produce better read and more accomplished lawyers, and to raise appreciably the standing and increase the usefulness of the legal profession in Canada.

Indeed, we should expect that this would be the outcome of such a combination in any country where law schools are established.

One distinguishing feature of the legal profession in Canada, as compared with that of England, consists in the fact that there is no recognized division or distinction between barristers and solicitors; the education for both is the same. It is possible, of course, for a man to be the one without being the other, but, in practice, I think this never happens now, in Ontario at any rate.

In all the provinces the legislatures have incorporated the members of the legal profession as a society empowered to make rules and regulations governing, among other matters, the admission, qualification, and education of barristers and attorneys or solicitors, and has enacted that only persons admitted to membership in such society are entitled to practise law.

Legal education, therefore, is uniformly intrusted throughout Canada to the legal profession itself, through its governing body in each of the provinces.

The literary qualifications required in all the provinces as a condition precedent to entrance upon the study of the law are:

- (1) A degree in arts or law in any university in Her Majesty's dominions empowered to grant such a degree, or
- (2) Matriculation in some university, or
- (3) The passing of a prescribed examination of a standard approximate to matriculation.

In the province of Ontario matriculation in some university in the Province is the minimum required of the candidate for admission.

These requirements secure that the candidate shall have a fair knowledge of English, Latin, Mathematics, and French, while in some cases a knowledge of either Greek or German is an additional requisite.

In all the provinces, students are obliged, before admission to practice, to spend some years as articled clerks in a solicitor's office, four or five years in the case of an ordinary clerk, three years in the case of a graduate, in order to acquire proficiency in practical work, and a knowledge of procedure which can be gained only in this way.



But at Dalhousie University in Nova Scotia, where there is a law school in full operation as part of the general scheme of university work, the faculty urgently recommend that students devote their whole time during session to the work of the school, experience having proved that students who undertake office work in addition to the work of their classes, receive comparatively little advantage from the lectures, and candidates for the degree of LL.B. are not required to attend lectures or take the examination in practice and procedure.

The advantages of a university education in either arts or law receive practical recognition in all the provinces by a shortening of the term of service between the periods of admission to study and qualification to practise law. The term of service under articles is generally shortened by two years, but in some of the provinces one year only is allowed. In Quebec this privilege of shorter service is limited to graduates in the faculty of law, while in Prince Edward Island, on the other hand, a degree in law is not recognized in this connection.

I have set out in the following table the number of students in the different provinces, with the length of service under articles in the case of graduates and non-graduates:

	STUDENTS.	YEARS' SERVICE UNDER ARTICLES.		
		B.A.	LL.B.	Non-graduates.
British Columbia .....	56	3	3	5
Manitoba .....	53	3	3	5
New Brunswick .....	30	3	3	4
Nova Scotia.....	45	3	3	4
North-West Territories .....	*	3	3	5
Ontario.....	300	3	3	5
Prince Edward Island.....	18	4	5	5
Quebec .....	250	4	3	4

\* This number cannot be given owing to the recent formation of the Law Society of the North-West Territories.

In British Columbia, Manitoba, the North-West Territories, and Prince Edward Island, there are no law schools, nor is any systematic provision made in these provinces or territories for the education of students, who therefore have to rely upon their own private reading for this purpose.

In Manitoba members of the bar give occasional lectures during the winter months to the Law Students' Society.

In Prince Edward Island one of the Judges of the Supreme Court has annually, for several years past, delivered a course of very valuable lectures upon the various branches of the law, which are invariably taken advantage of by the students.

In the other provinces much better provision is made for legal education.

There are law schools in New Brunswick, Nova Scotia, and Quebec, which are doing good work.

That of New Brunswick is an adjunct of the University of King's College, Windsor, Nova Scotia.

In Nova Scotia there is the law school of Dalhousie University, and in Quebec there are faculties of law in McGill and Laval Universities, which serve all the purposes of separate schools.

In McGill there are eight professors and three lecturers. Only one of these, the Dean of the Faculty of Law, gives his whole time to the work of the school.

The course extends over three years of seven months each.

In Laval there are thirteen professors; the course lasts for three years of nine months each.

In King's College there are twelve professors and instructors, none of whom give their whole time to the work; the duration of the course is three years of seven months each.

In Dalhousie there are two professors and five lecturers, of whom only the Dean gives his whole time to the work; the course is one of three years, of five months each.

Many eminent members of the bars of the respective provinces are to be found among the instructors at these institutions.

The subjects of instruction at Dalhousie and King's are the ordinary branches of English law, with the addition in the latter of Roman law.

International law is taught in both; in Dalhousie, but not in King's, the Conflict of Law forms part also of the course.

In McGill great attention is paid to the subject of Roman law, 115 lectures being given on this subject to the first year students.

In Laval 210 lectures in Roman law are given to students of the first year, the study of Roman law being, apparently, the main employment during the first year at this university.

In all the law schools in Canada the method of instruction is by lectures, with frequent reference to and comment upon cases, combined with oral discussions from time to time.

In none of them has the Langdell or Case system been adopted.

Attendance at these respective schools is not obligatory, and a degree in law of any of them is not accepted as sufficient for admission to practice, with the exception of Nova Scotia, where the Bar Society admits to practice without examination all who hold the degree of LL.B. of Dalhousie; in this province nearly all students of law take this LL.B. course.

The province of Ontario occupies a unique position in regard to legal education. It has one law school at Osgoode Hall, Toronto, which is the only avenue for admission to the practice of law. This school was established on its present basis by the Law Society of Upper Canada in 1889, under the provisions of Rules passed by the society in the exercise of its statutory powers. It is conducted under the immediate supervision of the legal education committee of the society, subject to the control of the benchers of the society in convocation assembled. Its purpose is to secure, as far as possible, the possession of a thorough legal education by all those who enter upon the practice of the legal profession

in the province. To this end, attendance at the School during three terms or sessions is made compulsory upon all who desire to be admitted to the practice of the law.

The course in the School is a three years' course, the term consisting of seven months, commencing in the latter part of September and ending in the latter part of the month of April following.

In each year two examinations have to be passed, one at Christmas, and the other in May following.

The staff of the School consists of the principal, whose whole time is given to the work, and four paid lecturers, members of the bar in active practice (three of them being Queen's Counsel), who have, from an experience of many years in this work, become very familiar with their subjects, and with the art of teaching.

Four independent examiners are appointed by the Law Society to conduct the examination in the School.

The course of study in the School is as follows:—

*First Year.*—Jurisprudence, Real Property, Equity, Common Law, Practice and Procedure.

*Second Year.*—Criminal Law, Real Property, Personal Property, Contracts, Torts, Equity, Evidence, Constitutional History and Law, Practice and Procedure.

*Third Year.*—Contracts, Real Property, Criminal Law, Equity, Torts, Evidence, Commercial Law, Private International Law, Construction and Operation of Statutes and Statute Law, Canadian Constitutional Law, and Practice and Procedure.

In all the years a number of statutes relating to the various objects of instruction have also to be mastered.

In addition to lectures by the staff, special lectures are delivered to the third year students by Judges of the Superior Courts and prominent members of the bar, on legal ethics, the Municipal Acts, the duties of a counsel at the trial of an action, guaranties, powers of directors of joint stock companies, and the procedure in the winding-up of companies under the Dominion and Provincial Acts for that purpose.

It may not be out of place to state that the whole cost to the student is under \$300; the sum of \$50 is paid to the Law Society on admission as student at law, \$160 for call to the bar and admission as a solicitor, while the Law School fees are only \$25 a term; \$75, in all, for three years education for his profession.

#### MOOT COURTS.

These form part of the system of instruction in Dalhousie, McGill, and Osgoode Hall.

At Dalhousie every candidate for an LL.B. degree is required to argue one case in his second year, and two in his third; attendance by students other than the contestants being voluntary; as a rule about one-third of the students attend the hearing of the arguments. The Faculty of Dalhousie think well of the effect of these Courts.

In McGill the experience of Moot Courts has not been very encouraging. They are held only at rare intervals, and attendance by the students is entirely optional.

The practical difficulty seems to be that the students, being all more or less engaged in office work, and having also a great deal of matter to read in connection with the lectures and for the purpose of examinations, have not much time at their disposal for working up cases for argument.

In the Osgoode Hall Law School, Moot Courts are held in the second and third years, and attendance by the students is obligatory. So far as the disputants themselves are concerned, considerable interest is manifested and arguments are very carefully prepared. The interest shown by those who do not take part in the argument is dependent largely upon the skill and ability with which it is conducted; any lack of interest that there may be is owing in part to a lack of these qualities by the disputants, and in part to the unreality of the subject-matter of discussion:

*"Fabula, non judicium, hoc est, in scenâ, non in foro, res agitur."*

An attempt has been made to counteract any lack of interest, by announcing that some of the Moot Court cases will be utilized in the examination papers, and this has been

actually done in some subjects, the effect being beneficial as far as general interest in these subjects is concerned. But, on the whole, in my judgment, Moot Courts are not very valuable factors in legal education so far as non-combatants are concerned.

Although the Law Society of Ontario has taken the advanced position outlined above in regard to legal education, there are still to be found not a few members of the profession who doubt the desirability of maintaining any law school, and who point to the high position at the bar taken by many men who have not had the advantage of any definite legal training.

If there be here to-day any such a "*laudator temporis acti, se puero*," I will quote for his consideration the words of two very distinguished English Judges on the subject of legal education.

Lord Russell, the Lord Chief Justice of England, whose eloquent plea for international arbitration has, I am sure, not been forgotten in this country, gives this opinion:

"I do not deny that without the liberal equipment which I would desire, men of ability may make large incomes, and even have distinguished careers at the bar, but I maintain that their careers would have been still more distinguished, their mark on their generation graven still deeper, and their contributions to the wisdom of the world, still weightier, had they possessed it."

And Lord Justice Vaughan Williams says:

"My own experience, gathered from an observation of many men at the bar and of solicitors, is this, that if a man commences practice without having learned the principles of the law, he never learns them afterwards.

"I know of many instances of young men in the legal profession, who, from one cause or another, have sprung into business at once, and have continued a successful business through many years, and of whom I have heard it said, 'a very able man, but not a good lawyer.'"

"He may go on and become a leader on a circuit, and he may become even more than this, but as he began, so will

he end—not a good lawyer. The principles of law must be learned at the beginning.”

Not without interest in this connection is a published criticism upon the work as a Judge of the late Lord Esher:

“As a lawyer he suffered, like a good many other English Judges, from the fact that he had never a really scientific training in the law, a defect which, not infrequently, led him to endeavour to do what he conceived to be ideal justice in the case before him, wholly regardless of whether his views of ideal justice accorded with those of the rest of the world.”

This paper would be incomplete, so far as the latter part of it is concerned, without quoting the words of that very distinguished member of the American Bar and of the American Bar Association, Mr. Joseph Choate, whose high political duties at the Court of St. James prevent his presence at this meeting, and whose absence—hiatus valde deflendus—is a subject of great regret to all. He says: “The young men who come annually from the law schools to recruit our ranks are better equipped and qualified—far more than ever we were—to enter upon the arduous and responsible duties that await them.”

N. W. HOYLES.

Toronto.

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## CONTRIBUTORY NEGLIGENCE.

The old rule of the common law was that a plaintiff who was guilty of contributory negligence could not recover for injury he may have sustained through the negligence or default of another. This doctrine was founded on the well-known maxim of the Roman law: *Quid quis ex culpa sua damnum sentire, non intelligitur damnum sentire*.

The Admiralty Courts, however, adopted a different principle. They have long held to the rule, *judicium rusticum*, that when both ships are in fault, in case of a collision, the loss is equally apportioned between them. If one was entirely in the wrong, the common law rule prevailed in the assessment of damages. The Judicature Act of 1873 confirmed this rule of Admiralty practice by enacting: "That if both ships shall be found to be in fault, the Admiralty rule shall prevail." This legislative enactment was but a recognition of the law laid down by Lord Stowell in "*The Woodrop Sims*" (a), that the doctrine of loss applies only when both ships are in fault and is admissible in no other case.

In some American cases it has been held, in other than Admiralty suits, when there has been default on the part of both plaintiff and defendant, the damage is divisible, and the plaintiff is only entitled to recover to the extent of the damage which would have been sustained without his fault. Such a doctrine, however, has not found favour in English Courts. In 1850, in the case of *Greenland v. Chaplin* (b), Chief Baron Pollock distinctly laid down the law in these words: "I entirely concur with the rest of the Court, that a person who is guilty of negligence and thereby produces injury to another, has no right to say—" part of

(a) 2 Dods. 83.

(b) 5 Ex. 246.



the mischief would not have arisen if you yourself had not been guilty of some negligence."

A review of the principal cases on this branch of the law may not only be interesting, but may at the same time prove serviceable to the practitioner by rendering readily accessible the settled principles of the law on a long vexed question.

In Buller's *Nisi Prius*, p. 26, we find a distinctive enunciation of a principle, which was subsequently overruled: "If a man lay logs across a highway; though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action."

*Butterfield v. Forrester* (c), decided in 1809, is the earliest leading case on this branch of the law. The defendant in making some repairs to his house put a pole across the street, leaving a passage by another road or street adjoining. Towards night the plaintiff, riding very hard, came unexpectedly upon the obstruction, and fell with his horse, receiving severe injuries. It was proved, if the plaintiff had not been riding so violently, he might have seen and avoided the pole. Bayley, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and they were satisfied the plaintiff was riding along the street without ordinary care, they then should find a verdict for the defendant. The jury under this direction found for the defendant. On motion for a new trial reference was made to the rule in Buller's *Nisi Prius*, yet the Lord Chief Justice Ellenborough, in dismissing the rule for a new trial, thus laid down the law: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. One person being in fault will not dispense with another using ordinary care for himself. Two things must concur to support this action; an obstruction on the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

*Davies v. Mann* (*d*), decided in 1842, calls for more than passing notice, for it was the first decision that clearly established the rule that plaintiff's negligence, or even unlawful act, did not disentitle him to complain of the negligence of the defendant or bar recovery of damages for the injury sustained, provided the defendant by the exercise of ordinary care might have prevented the mischief. Here the plaintiff had fettered the forefoot of his donkey and turned it loose on the highway to graze. The defendant negligently drove his horses and waggon against and killed it. It was held a proper direction that even if the plaintiff had illegally put the animal on the highway, he was still entitled to recover, if the accident might have been avoided by the exercise of ordinary care on the part of defendant. Parke, B., in delivering judgment dismissing the motion for a new trial, said: "For, although, the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

This decision settled the rule that contributory negligence was a bar to recovery, when it is the proximate cause of the injury; as well as the common rule that negligence on the part of the plaintiff, which is only part of the inducing cause, or, in other words, the remote cause of the mischief, would not disable him. *Causa proxima et non remota spectatur*.

*Davies v. Mann* and the subsequent case of *Tuff v. Warman* (*e*), decided in 1857, settled the law of contributory negligence in its modern form. The action in the last-named case was against the pilot of a steamer in the Thames for running down the barge of the plaintiff. The plaintiff's own evidence showed there was no outlook on the barge. As to the conduct of the steamer by defendant's witnesses the evidence was conflicting; but, according to plaintiff's witnesses, she might easily have cleared the barge. Willes, J.,

(*d*) 10 M. & W. 546.

(*e*) 2 C. B. N. S. 737.

told the jury: "That if the negligence or default of the plaintiff was in any degree the direct or proximate cause of the damage, he was not entitled to recover, however great might have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might by the exercise of ordinary care have avoided it." Under this charge the jury returned a verdict for the plaintiff. It was held on appeal to the Court of Exchequer Chamber (*f*) that this was a proper direction. In giving his judgment in the Court of Exchequer Chamber, Wightman, J., said: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence, or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence, or want of ordinary care or caution, would not, however, disentitle him to recover, unless it were such that, but for that negligence, or want of ordinary care, the misfortune could not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

The doctrine enunciated in the cases of *Davies v. Mann* and *Tuff v. Warman*, that to bar recovery on the part of the plaintiff, two elements must concur—a want of ordinary care on the part of the plaintiff, and a proximate connection between this want of ordinary care and the injury complained of—received a marked confirmation in the notable case of *Radley v. London and North Western Railway Company* (*g*), which reversed the judgment of the Exchequer Chamber (*h*),

(*f*) 5 C. B. N. S. 537.

(*g*) 1 App. Cas. 754.

(*h*) L. R. 10 Ex. 100.

and restored that of the Court of Exchequer (i). The facts were briefly these: The defendant company was in the habit of taking full trucks from the siding of a colliery owner, and returning the empty trucks there. Over the siding was a bridge. Towards night, the servants of the company ran several empty trucks on the siding. One, however, was loaded with a broken truck to such a height that it could not pass under the bridge. Shortly after other trucks were brought, and on being pushed along the siding by the engine, the loaded truck struck the bridge and broke it down. In an action brought to recover damages for the injury done, the defence of contributory negligence was set up. The ground was that the servants of the owner of the colliery should have reported to the company the danger of breaking the bridge by the loaded truck in case other trucks were pushed along the siding. Mr. Justice Brett, who tried the cause, charged the jury in these words: "The law is this; the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiff. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants." On appeal to the House of Lords, it was held a misdirection and a new trial ordered. The judgment of the House of Lords was happily expressed by Lord Penzance in these words: "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

(i) L. R. 9 Ex. 71.

The following deductions are drawn from the dicta and rules of law laid down by the different Judges in the leading cases referred to:

Contributory negligence, *ex vi termini*, implies that the negligence of both parties must combine and concur to produce the injury.

To enable the plaintiff to recover, he must prove that the defendant's negligence was the immediate efficient cause of the injury. If contributory negligence is interposed in bar of the action, it must appear that there was no want of ordinary care contributing to the injury as an efficient and proper cause thereof.

To bar plaintiff's right of recovery, three things must be established: first, contributory negligence; second, want of ordinary care on the part of the plaintiff; third, a proximate causal connection between that want of ordinary care and the injury.

The want of ordinary care on the part of the plaintiff will not bar his right of recovery, if it were not the proximate cause of the injury.

The plaintiff may have proximately contributed to his own injury, by his conduct, yet he will not be debarred the right of recovery, if not guilty of a want of ordinary care.

The following extract from the American and English Encyclopædia of Law happily illustrates the relative effect of proximate and remote cause as elements in contributory negligence:

"In the application of the principle that the law looks at the proximate, and not at the remote, cause of the injury, lies the great difficulty in the law of contributory negligence. No general rule for determining when causes are proximate, and when remote, has yet been formulated. But the principles that govern the determination of the question are well settled. When it is once established that a person injured by the negligence of another has been guilty of a want of ordinary care, it becomes necessary to determine whether such want of ordinary care proximately contributed to the injury as an efficient cause, or only remotely, as a condition or remote cause thereof. If it proximately contributed,

there can be no recovery, but if it was only a remote cause or condition of the injury, a recovery can be had."

If the negligence of both parties is concurrent, then the negligence of each is proximate, and the loss rests where it falls.

If one by the exercise of ordinary care could have discovered the negligence of the other in time to guard against its consequences, his negligence, in not discovering the negligence of the other, is held to be the proximate cause of the injury.

The burden of proof is upon the defendant of proving contributory negligence, and it is not for the plaintiff in the first instance to show that he has not been guilty of contributory negligence.

After the plaintiff has proved the negligence of the defendant, it is necessary for the defendant, in order to succeed, to establish that the plaintiff has been negligent in respect of the matter complained of, and might have avoided the consequences of defendant's negligence; and that he, defendant, could not by the exercise of ordinary care have avoided it.

If the defendant has by his negligence so acted that he has put it out of his power to avoid the negligence of the plaintiff, this is equivalent to his being able to avoid it and negligently omitting to do so.

SILAS ALWARD.

Saint John, N.B.

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## EDITORIAL REVIEW.

**The Late Lord Watson.**

There will probably be no dissentient voices raised in the legal profession when we say that in the death of Lord Watson, on the 14th September last, the whole British Empire has sustained a loss. That law is the foundation of order, and its due administration the supreme duty of a state, are facts which have been recognized throughout the British Empire in a pre-eminent degree, and it is owing to this, and to the fact that the Judges in the highest Courts of the Empire have been men of the most conspicuous legal ability, and of the utmost integrity and impartiality, that we find wherever English rule extends, respect for law is the distinguishing characteristic of the people. And the reason is not far to seek; it is because the people have a well-grounded confidence in the ultimate tribunals of the Empire, and this confidence has been inspired and fostered as far as the outlying portions of the Empire are concerned by the wisdom and justice of the decisions which have from time to time emanated from the Judicial Committee of Her Majesty's Privy Council. To the decisions of that body, as also to those of the House of Lords, for the last nineteen years, the late Lord Watson in no small degree contributed, and by the clearness of his reasoning, and the strong good sense which he always displayed in dealing with cases coming before him, he carried conviction as to the soundness of his judgment, and demonstrated that all civilized law must, from the British standpoint, have its true foundation in the perfection of reason.

Lord Watson, like many other men who have risen to eminence, was the son of a minister, the Rev. Thomas Watson, of Covington, Lanarkshire, and was born in 1828. After completing his studies at the Universities of Glasgow and Edinburgh, he entered upon the career of an advocate, and was admitted a member of the Scotch bar in 1851. In 1874

he was appointed Solicitor-General for Scotland, and in 1875 he attained the honourable position of Dean of the Faculty of Advocates. In 1876 he was elected member of Parliament for the Universities of Glasgow and Aberdeen, and in the same year was promoted to the position of Lord Advocate, and received from the University of Edinburgh the degree of LL.D. In 1880 he ceased to be a member of Parliament, and was appointed a Lord Justice of Appeal, and was created a peer for life, taking the title of Lord Watson of Thankerton, in the county of Lanark. From that time forward until a few weeks before his death, he has continuously taken a prominent part in the judicial business of the House of Lords and of the Privy Council, and for the last ten years may be said to have taken a leading part in the deliberations of those tribunals.

Though Lord Watson was, as we have seen, trained up in the practice of Scotch law, he was distinguished by his broad and comprehensive grasp of those fundamental legal principles which underlie all civilized systems of law, and to whatever particular system he might have to apply himself, whether it was English or Irish or Scotch law in the House of Lords, or whether it were Roman-Dutch, French-Canadian, Mahomedan, or Hindu, or any other of the multifarious systems which have from time to time to be considered in the Privy Council, he was able by a sort of judicial instinct to reach a sound conclusion,—his Scotch training, however, at times peeped out, in the use of the peculiar technical phraseology of Scotch law, even when dealing with cases to which that law did not apply.

Lord Watson was one of the few judges raised to the supreme tribunals of the Empire without any previous judicial experience. He is said to have owed his good fortune in this respect, not so much to any extraordinary capacity that he had evinced at the bar, but principally to the paucity of Scotch Conservative lawyers. But whatever may be the truth in this respect, his selection was amply justified in the result, and he lived to prove himself in an extraordinary degree well-fitted for the important position in the judiciary to which he was called; indeed, he was styled not long since



in the columns of an English contemporary not given to undue laudation of the judiciary, "a supreme lawyer."

His judgments are to be found in the L. R. Appeal Cases, extending from volume 5 down to the current volume. Several of the cases involving the construction of the British North America Act have come before him, and he has, in his judicial deliverances, furnished a valuable commentary on that enactment, and the principles to be pursued in its construction.

Among the Canadian cases appealed to the Privy Council in which the late Lord Watson delivered the judgment of the Board may be mentioned the well-known cases of *The Queen v. Doutre*, 9 App Cas. 745; *Windsor and Annapolis R. W. Co. v. The Queen*, 11 App. Cas. 607; *DuMoulin v. Langtry*, Wheeler's P. C. Law, p. 971; *St. Catharines Milling Co. v. The Queen*, 14 App. Cas. 96; *Attorney-General for British Columbia v. Attorney-General for Canada*, 14 App. Cas. 295; *Town of St. John's v. Central Vermont R. W. Co.*, 14 App. Cas. 590; *City of Montreal v. Les Ecclésiastiques du Séminaire de St. Sulpice*, 14 App. Cas. 660; *Tennant v. Union Bank*, [1894] A. C. 31, a case twice argued; *Casgrain v. Atlantic and North-West R. W. Co.*, [1895] A. C. 282; *Attorney-General for Ontario v. Attorney-General for Canada*, [1896] A. C. 348 (jurisdiction of Province and Dominion as to liquor legislation); *Esquimalt and Nanaimo R. W. Co. v. Bainbridge*, [1896] A. C. 567 (rights of Crown in precious metals); *Attorney-General for Quebec v. Attorney-General for Ontario*, [1896] A. C. 348 (as to liability for Indian annuities); *Attorney-General for Canada v. Attorney-General for Ontario*, 77 L. T. 539, (the Queen's Counsel case).

#### **Punctuation of Statutes.**

A contemporary calls attention to an American case, *Tyrell v. City of New York*, 53 N. E. Repr. 1111, in which the Court regarded the punctuation of a statute as a guide to its interpretation. In Ontario the fashion has apparently been to disregard the punctuation entirely—probably because it is uniformly vile, and has no significance whatever. A

notable instance of this disregard is in the case of the statutory provision regulating appeals from the County Courts, now s. 52 of R. S. O. cap. 55. The proviso at the end, as to the finality of the order appealed against, if looked at in the light of the punctuation, applies only to the last mentioned class of decisions; but in a long line of cases it has been held to apply to the whole section. Curiously enough, in the well-reasoned judgment of the Court of Appeal in *Baby v. Ross*, 14 P. R. 440, no allusion is made to the punctuation; but in *Hunter v. Hunter*, 18 Occ. N. 14, a Divisional Court expressed the opinion that the proviso at the end of the enactment, as to the order being in its nature final, governed the whole section, notwithstanding the punctuation. That case was decided since the revision of 1897, which left the punctuation just as it was in s. 42 of R. S. O. 1887 cap. 47, which *Baby v. Ross* interpreted.

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# THE CANADIAN LAW TIMES.

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DECEMBER, 1899.

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## JURISDICTION FOUNDED ON DOMICIL.

*GENERAL.*—There is perhaps to-day a greater need than ever before for the attention of all jurists to international law, and there never was so grand an opportunity of bringing under the search-light of modern civilization the different questions handled in so many divers ways by the nations whose desire for harmony and peace has brought about what has been termed a philosophical unity under the head of international law. The trend of modern times has been to bring out unity in variety, and we have one class of jurists who see in the uniformity of legislation of different territories a menace to the progress of each individual nation; in so far as each state is prevented from enjoying that freedom of thought and movement which brings about reforms in every department of law. There are many problems of international law presented to each individual State for solution, but civilization is becoming more and more widespread, and the desire for peace and harmony in external and internal relations in bringing about that friendliness to strangers which is to-day the mark of the prosperous nation in all its relations of life. There is one sovereign law which is at the basis of international law, and that law is the biblical precept "Do unto others as you would they should do unto you," and the recognition of this great principle will soften and solve many of the seeming difficulties with which the subject of international law to-day is fraught. Uniformity means oneness and unity, and there is perhaps no more im-

portant topic in international law to-day than that with which it is proposed to deal—domicil as a foundation for jurisdiction. It would appear at times that the nations are separating farther and farther from each other in so far as the personal statutes are concerned, but the means of communication which bring to us this knowledge of lack of agreement should be the means of bringing about ultimate harmony in all legislative enactments upon international topics. It is hardly necessary to point to the unity in language, sentiment, religion, and trade which binds the English speaking peoples of the world; and the uniformity of laws would simply make sure the progress which has been made in the line of universal peace and good will to all mankind. The importance of all topics of international law is sometimes neglected because the individuals of the different States do not recognize the benefits which are derivable from such a condition of universal peace. If the trade relations be perfectly harmonious and free, and there be a proper measure of respect each for the other of the nations, no condition of affairs which is not based on the same rule of peace and harmony can stand.

*B. N. A. Act.*—Canada, as a dependency of the United Kingdom of Great Britain and Ireland, takes its powers by the express enactment of the Imperial Parliament which is familiar to all jurists under the name and title of the British North America Act. In looking then to the powers which are vested in the Parliament of Canada, it is necessary to scan closely the legislation, treaty, or other positive enactment by which the powers are granted. It is true, as a matter of judicial decision (*a*), that the British Parliament could vest in Colonial Legislatures powers co-equal with its own; and if this be so, it is a question for us to determine with exactitude the nature and extent of the restrictions, if any, which are discernible upon the face of the writing. If, therefore, we look at section 91 of the British North America Act, we shall find the following words of enactment:—“It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in rela-

(*a*) Per Sir Henry Strong, C.J.C., 27 S. C. R. p. 478.

tion to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for the greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say: s.-s. 25, Naturalization and Aliens; s.-s. 26, Marriage and Divorce; s.-s. 27, the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters." It follows then from this wording that certain exclusive powers are granted to the Dominion Parliament, and, that there may be no mistake about these several matters, the Provincial Legislatures are expressly forbidden to deal with such matters of exception. For the purposes of this article it is intended to deal with sub-section 26 of section 91, which sub-section relates to the subject of marriage and divorce, and in this way to trace the influence which the technical doctrine of domicile has upon the jurisdiction thus thrust upon the Parliament of Canada to pass remedial enactments at the prayer of those over whom the Parliament has authority. We thus see that the Imperial Parliament has vested in the Parliament of the Dominion of Canada the power to deal with marriage and divorce, and as the Federal Government has control of these matters, the domicile of the parties may be the domicile of any one or more of the several Provinces which comprise the Dominion and still preserve their British political nationality. These powers are apparently such as could be delegated to a Federal Court or to the Courts of the several Provinces of the Dominion, and it is fairly arguable and reasonable to make the statement that on the construction of the British North America Act these powers "are not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 (91) as the Imperial Parliament in the plenitude of its power possessed or could bestow." (b)

(b) *The Queen v. Hodge*, 9 App. Cas. p. 182.

*Domicil.*—To define domicil is not an easy matter, as in later years the term has become extremely technical in its use, and consequences flow from domicil which were unthought of in the day when precedents in relation to marriage and divorce were few. Domicil has been defined as “that place where a man has his true, fixed, and permanent home and principal establishment, and to which, whenever absent, he has the intention of returning.” Domicil differs from residence, for a man can have but one domicil, whilst he may have more than one residence. Domicil, in other words, is territorial, and has to do with personal status. In matters of status domicil is the foundation of jurisdiction. “It is the tie by which a person is attached to a civil society,” (c) and certain questions must be decided according to laws chosen with reference to the person. Again—“Residence and domicil are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicil should exist, and that the fact of domicil should be ascertained, in order to determine which of two municipal laws may be invoked to regulate the rights of parties. . . . It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicil, and that domicil remains his fixed attribute until a new and different attribute usurps its place.” (d) Domicil is peculiarly a matter of private international law, for it covers and has relation to the duties and rights of the individual to the country in which he is domiciled. The theory upon which the law of domicil proceeds is that every individual is and must always be a subject of some one State, and is amenable to the discipline of the Government of that State. Domicil of origin may be changed by the acquisition of a domicil of choice, as for example by naturalization, or by operation of the law, as for example by marriage, but in every case where there is a departure from a domicil of origin the Courts of England are slow to recognize the domicil of one of its subjects in a foreign State, and require strict proof on the part of the individual alleging such change of domicil. The domicil

(c) See Westlake's *International Law*, p. 263.

(d) See per Lord Westbury in *Bell v. Kennedy*, L. R. 1 S. & D. A. 390

of the wife, however, is always, according to English and Canadian law, the domicile of the husband, and under no circumstances do the learned Judges permit of the acquirement of a separate domicile, or domicile for matrimonial purposes, on the part of the wife.

*Marriage.*—To ascertain what marriage is in the eyes of the law reference can be had to Mr. Justice Storey's work on the Conflict of Laws, section 109, which reads as follows:—"The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of the parties. But it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of the parties, but are to a certain extent matters of municipal regulation, over which the parties have no control by any declaration of their will." And again, Phillimore, J., in *Le Sueur v. Le Sueur* (e) says: "The contract of marriage is often and truly said to be one of *juris gentium*, inasmuch as it is a contract not only concerning private rights but deeply affecting public order. It is a question both of status and of contract.

*English Law.*—Marriage and divorce were originally subjects of ecclesiastical jurisdiction, and the Bishops of the Church formed a judiciary with an appeal to the Pope in case of dissatisfaction. At the reformation the authority to control such matters remained vested in the Bishops, but the appeal was changed from the Pope to the Crown. In the year 1858 the law relating to divorce and matrimonial causes in England (20 & 21 V. c. 85) was amended, and the Episcopal jurisdiction in matrimonial causes was transferred to the Crown; and the procedure for divorce a vinculo was changed from Parliament to a regular Court (f)

In *Shaw v. Gould* (g) Lord Westbury in the course of his judgment laid down the law that "it is one of the rules

(e) L. R. 1 P. D. 147.

(f) Westlake Pr. Int. Law, p. 71.

(g) L. R. 3 H. L. 383.

of universal jurisprudence that questions of personal status depend on the law of the actual domicile." If, then, the domicile of the husband be English, the law of England is the governing law so far as all questions relating to marriage and divorce are concerned, and in applying this statement of law to the matters now before us it is plainly evident that the law of domicile is one of great importance.

In *Whicker v. Hume* (h) Lord Cranworth states: "It is not inexpedient on questions of this sort to say, that I think that all Courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country. . . . Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam*. But that is not a presumption at which we ought easily to arrive." There are therefore in all cases before the English Courts two questions for decision. Firstly, the domicile of origin of the husband, and secondly, the domicile of the husband at the time that the action or proceeding for a divorce is brought. In looking again at the judgment of Lord Westbury in *Shaw v. Gould* (i), we find this distinct enunciation of the law on jurisdiction to dissolve marriages:—"The position that the tribunal of a foreign country having jurisdiction to dissolve marriages of its own subjects is competent to pronounce a similar decree between English subjects who are married in England, but who, before and at the time of the suit, are permanently domiciled within the jurisdiction of such foreign tribunal—such decree being made in a bona fide suit without collusion or concert—is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as 'The Resolution of the Judges in *Lolley's Case*.' On the other hand a decree of divorce *a vinculo* pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it ventures upon the interests of any other country to whose tribunal the spouses were amenable, claim extra-territorial authority."

(h) 7 H. L. Cas. 159.

(i) L. R. 3 H. L. 383.



In Sinclair's Divorce Bill (*j*) the rule is laid down that great caution ought to be observed in allowing a petition for divorce to proceed in the English Divorce Court, where there is ground for supposing that the parties are domiciled out of the jurisdiction; "and the broad statement may be made that where the domicile of parties is English, the jurisdiction of the Court is founded though the marriage and delictum may have taken place abroad." (*k*) Then again in one of the latest cases before the English Courts, namely *Le Mesurier v. Le Mesurier* (*l*), it is expressly decided that where the jurisdiction exercised is in accordance with the principles of international law, the decree ought to be respected by the tribunals of every civilized country; but where it is derived solely from some rule of the municipal law of the particular country, it cannot claim extra-territorial authority, if it trenches upon the interests of any other country to whose tribunals the spouses are amenable." Hence a rule is established by which international law and municipal law may be distinguished according as it has or has not extra-territorial effect.

The question of a matrimonial domicile has been expressly negatived, and for the present, so far as the law of England is concerned, the contention is set at rest. Any statement on this branch of case law would not be complete without the citation of a few cases in which it would appear that the Courts had founded jurisdiction where there was domicile:—Without residence, *Gillis v. Gillis* (*m*). Residence of the husband in England, though both himself and his wife were foreigners, married in a foreign country, and the offence was committed in a foreign country, provided his residence is bona fide and permanent in England, although not sufficient for the purpose of succession, *Brodie v. Brodie* (*n*). But this residence must be bona fide, *Manning v. Manning*. (*o*) Again, where a natural born English subject married an

(*j*) [1897] A. C. 469.

(*k*) *Ratcliffe v. Ratcliffe*, 1 Sw. & Tr. 457.

(*l*) 64 L.J.P.C. 97 (1895).

(*m*) Ir. R. 8 Eq. 597.

(*n*) 2 Sw. & Tr. 259.

(*o*) 19 W. R. 479.

English woman in England, and afterwards acquired a domicile in the United States and inter-married there, it was held in *Deck v. Deck* (*p*) that the English wife, being a native born English woman, was entitled to present her petition, and also held that the husband could not shake off his liability to the authority of the laws of his native country; and the Court dissolved the marriage.

The case of *Le Sueur v. Le Sueur* (*q*), in which it was decided that where the husband had a Jersey domicile, and afterwards deserted his wife and went to America, even if the wife, without a sentence of judicial separation, could acquire a distinct domicile in this country (England), she could not make her husband amenable to the *lex fori* of her new domicile. would seem to embody the English law as it stands to-day.

To enter at greater length into a discussion of the host of cases which have been decided in the English Courts upon the questions raised in this paper would mean travelling too far afield.

*Canadian Law.*—In dealing with Canadian cases, it may be laid down as a general rule that all the decisions are governed by the English cases. So in Ontario we find it laid down in *Edwards v. Edwards* (*r*) that the domicile of the husband controls the domicile of the wife. The question of domicile in Canada is raised, in the majority of cases, in actions for alimony, because, as has been set forth, the provincial judiciaries have in Canada no jurisdiction to try divorce. The same rules as are applicable to the English law of domicile rule in Canada. In *Guest v. Guest* (*s*) a husband obtained a divorce from his wife in a foreign State, in which he was bona fide domiciled, by proceedings of which notice was served personally on the wife, which were not collusive nor contrary to natural justice, and for delictum on the wife's part. Chancellor Boyd held "that the husband being domiciled in Ohio, his domicile was the domicile

(*p*) 2 Sw. & Tr. 90.

(*q*) 45 L.J.P. 873.

(*r*) 20 Gr. 392.

(*s*) 8 O. R. 344.

of his wife also, so as to give jurisdiction to the Ohio Court. The effect of the foreign decree is binding everywhere, and I hold that its effect of dissolving the marriage should be recognized and acted on in this Province."

The next case in Ontario to which it seems necessary to advert is *Magurn v. Magurn* (*t*), and it is notable as the clearest and most concise judgment on this question in the Ontario Reports. The judgment of Chancellor Boyd was sustained upon appeal (*u*). The head-note of the case reads as follows:—"Where in an action for alimony it appeared that the defendant had, previously to action brought, obtained a divorce from the plaintiff in Missouri, one of the United States of America, and for that purpose had resided a sufficient time in Missouri to comply with the local law covering divorce, yet that his bona fide domicile, both at the time of his marriage with the plaintiff, which also took place in the United States, and at the time of the said divorce was Canadian:—Held, that the divorce did not operate in this Province so as to bar the plaintiff's claim for alimony. The marriage relation cannot be properly regarded as one of mere contract, for the rights, duties, and obligations arising from it are not left entirely to be regulated by the agreements of the parties, but are to a certain extent matters of municipal regulation. As to this the law of domicile must be looked to." The effect of this judgment is to set aside a divorce obtained in the State of Missouri, one of the United States of America, but there is the further element that the ground upon which this divorce had been granted was desertion for one year. In Canada, following the law of England, Parliament will not divorce husband and wife unless there be proof of adultery and desertion on the part of the husband. In no decision in the Ontario Reports is there any encouragement of the doctrine of matrimonial domicile, and the result is that the law as set forth, which provides that the domicile of the husband is the domicile of the wife, is in full force and vigour.

(*t*) 8 O. R. 570.

(*u*) 11 A. R. 178.

In a comparatively late case of *Taillifer v. Taillifer* (v), where the facts showed an ante-nuptial contract in Quebec and marriage there, but residence and death in Ontario, intestate, the Courts held that this contract must govern all the property of the intestate, movable and immovable, though situate in Ontario, provided that the laws of Ontario relating to real property had been complied with, and that it made no difference whether the matrimonial domicil of the parties at the time of contract and marriage was in Ontario or Quebec."

The case law in Ontario, so far as is applicable to marriage, is even more strict and inelastic than that of the mother land. But Hagarty, C.J.O., in *Magurn v. Magurn* (w), makes the statement that "there is no safe ground for distinction between domicil for succession and for matrimonial purposes or a domicil by residence." The learned Chief Justice refers particularly to *Harvey v. Farnie* (x) as the authority for such statement.

In *Stevens v. Fiske*, decided 12th January, 1885, in the Supreme Court of Canada (y), both parties were domiciled in New York, and though the husband lived for some years in Montreal, his wife being a resident of the State of New York, instituted proceedings before the Supreme Court of New York on the ground of the husband's delictum. The husband was personally served with process at Montreal and appeared by his attorneys. The wife obtained a decree absolute. In an action for account brought by the wife against her husband, the husband set up the defence that she was still his wife and could not maintain an action. Mr. Justice Gwynne cites the rule as to domicil for divorce and refers to *Deck v. Deck* (z); *Bond v. Bond* (a); *Niboyet v. Niboyet* (b); *Harvey v. Farnie* (c), and states—"We should not,

(v) 21 O. R. 337.

(w) 11 A. R. 178.

(x) 5 P. D. 153.

(y) 8 Legal News, p. 42: Cassels's Digest, 235.

(z) 2 Sw. & Tr. 91.

(a) Ib. 93.

(b) 4 P. & D. 1.

(c) 8 App. Cas. 53.

in my judgment, hesitate to recognize the decree in the Supreme Court of New York to be valid and binding on the defendant." Mr. Justice Henry supported the decision in the following terms:—"The New York Court had full jurisdiction and its decree dissolved the marriage. By comity of nations, respect must be shown to the decision of a foreign Court shown to have jurisdiction over the parties."

*American Law.*—In seeking for the foundation of jurisdiction in the Courts of the United States, we find that the domicil of the husband is the domicil of the wife; and though the husband has the authority to determine where it shall be, his domicil does not change with hers. To this general statement there are two exceptions:—

(a) A wife may, in proper circumstances, as where she is abandoned, acquire a settlement, separate from her husband.

(b) Where married parties are living under a judicial separation or divorce from bed and board, the domicil of the wife does not follow the husband's (*d*).

The treatise writer lays down as a statement of the law as it exists in the United States, that when the law authorizes a suit between a husband and his wife for divorce and makes the jurisdiction for it dependent, among other things, on domicil, there is an irresistible implication that if she needs a separate domicil to give effect to her rights, or if his case requires her to have one to make his effectual, the law has conferred it on her. And he further urges that it would not be necessary to regard the wife's separate domicil as complete for every purpose, but it is a quasi domicil for the special purpose of divorce.

In *Cheever v. Wilson* (*e*) the Supreme Court of the United States decided that after the husband has committed the offence, the wife may acquire a new domicil wherein to have the marriage dissolved (*f*).

Adultery is the only ground of divorce recognized by the English law and the Canadian law, and the same rule applies

(*d*) Bishop on Marriage & Divorce, 6th ed., 2nd vol., p. 115.

(*e*) 9 Wal. 108, 123.

(*f*) See also *Bennett v. Bennett*, Deady 299.

in a number of the States of the United States. Particular reference may be had to the law of the State of New York, which expressly provides that divorce shall be obtained for no other cause.

The Code of Civil Procedure in New York State, sections 1756 and 1768, are in terms as follows:—

Sec. 1756—“In either of the following cases a husband or wife may maintain an action against the other party to the marriage, to procure a judgment divorcing the parties and dissolving the marriage, by reason of the defendant's adultery:—

“ (1) Where both parties were residents of the State when the offence was committed.

“ (2) Where the parties were married within the State.

“ (3) Where the plaintiff was a resident of the State when the offence was committed, and is a resident thereof when the action is commenced.

“ (4) When the offence was committed within the State, and the injured party, when the action is commenced, is a resident of the State.

Sec. 1768—“If a married woman dwells within the State when she commences an action against her husband, as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere.”

It will be seen by reference to these sections of the Code, that if a married woman dwells within the State at the time of the commencement of an action against her husband she is deemed a resident thereof, although her husband resides elsewhere, and the Courts of New York State have jurisdiction to divorce the parties and dissolve the marriage. Domicil, in the sense in which it is used in connection with English and Canadian decisions, is not a prerequisite to an action on the part of either husband or wife in the United States. Prior to the 1st day of July, 1899, in the State of North Dakota the laws regarding marriage were so lax as to enable a party to obtain a divorce after three months technical residence. The grounds upon which some two thousand or more divorces were obtained in the past five years in North

Dakota were "cruel treatment" and "grievous mental suffering." The laxity of the North Dakota statutes in this respect was responsible for a large increase in the revenue of the State.

In deference to public opinion and the antagonistic attitude of the Bench and Bar, the law has been amended, and the term of residence extended to what may be deemed a reasonable lapse of time, namely, one year's legal residence. The amended legislation now provides for the annulment of decrees of divorce which have been obtained upon a false statement of the citizenship of the party applying for relief. The ease and facility with which divorces were obtained, first in South Dakota, then in North Dakota, attracted the attention of the world: but this disrepute was more than off-sett by the refusal of the Judges of the New York Supreme Court to recognize such divorces as valid when questioned in their jurisdiction.

*Comparison.*—In thus comparing the case law of the several countries to which particular reference has been made, it is found that the law of England and Canada requires a strict technical sense of domicil as the foundation of jurisdiction in matters of status. In the United States cases, on the contrary, we find that the law has, in some instances, run to the opposite extreme, and domicil, as known to us in its technical sense, gives place to residence in founding jurisdiction to try such causes.

The question for jurists to-day would seem to be, how can domicil and residence be reconciled, each as a basis of a proceeding which deals with the personal status of the people? And again, can the remedy of divorce be restricted to the moral offence?

Uniform legislation would necessarily bring about general recognition of the judgments of the Courts of all lands, and by this consensus of enactment a union would be established which would be a plank in the platform of universal peace and good will, which is the ideal of international jurists.

The science of law is the reduction of all phases of law to one: and if there were but one law in connection with these matters, the world would be distinctly the gainer. From the

Canadian standpoint, it would seem desirable to have either a Federal Court or grant jurisdiction to the Superior Courts in each Province to deal with such matters.

The stringent rule of domicil could perhaps be relaxed, and in safeguarding the status of the husband a little more liberal view could perhaps be taken of the wife's rights and burdens so far as the State is concerned.

Recent legislation in England, Canada, and the United States bears the imprint of the modern thought of the freedom of the married woman in so far as her property rights are involved: but the United States is the one country which recognizes the right of a wife to acquire such residence as is necessary to found jurisdiction to free herself from the burden of an immoral husband. The legislative enactments of progressive nations would seem to place the married woman on a legal equality with her husband so far as her ability to make contracts and hold property is concerned, and it has been laid down by some treatise writers that marriage is wholly a matter of contract. Taking it for granted that marriage is both a status and a contract, could the freedom which is now given to the wife as regards contracts be extended to status? The large question of extra-territorial legislation looms up in the mind, and behind it comes the subject of foreign judgments and other matters of private international law, the solution of which will be made easy if the law of domicil be made uniform for all nations.

W. W. VICKERS.

Toronto.

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## THE DUTIES AND LIABILITIES OF TRUSTEES.

Trusts had their origin in fraud. Of them it was quaintly said:—"Their parents were fraud and fear, and a Court of conscience their nurse." The hard-pressed creditor, unable to meet his liabilities, assigned his legal estate to a friend, leaving the creditor with a barren judgment as the only result of his pains. The assignor was left to rely entirely upon the honesty and good faith of his friend. It fails to excite surprise that the usufruct was often diverted into channels other than those intended. Legal ingenuity, however, soon devised means of remedying this evil. In the reign of Richard II., Lord Keeper Waltham originated the writ of subpoena, whereby the trustee could be brought in Chancery and compelled to answer upon oath as to his disposition of the estate of the cestui que trust. This protection afforded so great an impulse to this new disposition of realty, that soon, it is said, half of the lands in the kingdom became vested in feoffees to uses.

Lord Coke's definition of a use has generally been adopted by text-writers:—"A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which cestui que trust has no remedy but by subpoena in Chancery."

This definition is now generally regarded as too narrow, as it was applicable to real estate only. The following, it is asserted, is among the best definitions yet given of a trust:—"A trust is an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him, to apply or deal with property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence."

When the instrument creating the trust indicates the property, defines the purposes of appropriation, and the subjects of benefit, it is called an express trust. When a fiduciary

relation is created by dealing with property in a certain way, or by the acts of a party, a position of trust is presumed without any such declaration; an implied trust arises by operation of law, to prevent fraud and meet the ends of justice.

The duty and responsibility of a trustee are thus defined by two judges who rank among the ablest and most learned of our times. Sir George Jessel, Master of the Rolls:—"A trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that, there is no liability or obligation on the trustee:" *Speight v. Gaunt* (a). Lord Herschell:—"The law requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs:" *Rae v. Meek* (b). To which may be added the dictum of Lord Hardwicke: "By accepting a trust a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that he had no benefit from it, but that it was merely honorary. For though he (the trustee) was not bound to enter upon the trust, yet, if he does enter upon it, he must take care not to miscarry, at least by mismanagement of his own."

It is the first duty of the trustee to reduce into possession the subjects of his trust, for from the time of his acceptance of the position, he becomes chargeable with their custody. The law, however, calls for no higher degree of care for their safe-keeping than an ordinary prudent man of business exercises in the conduct of his own affairs.

In the case of *Jones v. Lewis* (c), it appeared, goods had been stolen from the solicitor to whom they had been intrusted by the defendant trustee. In his judgment Lord Chancellor Hardwicke thus laid down the law:—"I do not know, that a bailee, executor, administrator, or trustee, are bound to keep goods always in their own hands. They are to keep them as their own, and take the same care; if therefore a man lodged trust money with a banker, if lost, in many cases the

(a) 22 Ch. D. p. 739.

(b) 14 App. Cas. p. 569.

(c) 2 Ves. 241.

Court has discharged the trustee, especially if lost out of the banker's hands by robbery. In the present case what has been done, is, what she would have done with her own; leaving them with her solicitor in order to be delivered to plaintiff when proper so to do; and why might she not do that? It is the same as if they had been in her own custody \* \* \* . It would be too hard to charge her with things lost." The following dictum of Vice-Chancellor Bacon—"A trustee who takes another man's money into his hands is bound, whatever other duties he may have to discharge, to take care that that money shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money"—was thus referred to by Jessel, Master of the Rolls, in *Speight v. Gaunt* (*d*): "That is a very clear statement of the law, and I have no fault to find with it."

In the case of trust funds deposited in a bank, it is generally held that the trustee will be shielded from liability for loss in consequence of the failure of the bank, provided he has exercised reasonable care in its selection. However, in *Re Knight's Estate* (*e*), where a trustee, charged to see that the funds "be securely invested," allowed them to remain for two years as an investment in the bank where they were when he was appointed trustee, he was held accountable for the loss on failure of the bank. Trust money should be paid into the bank to the credit of the estate, in the name of all the trustees jointly, and payable on their joint order or check. It should be kept distinct from the trustee's own private money; if he mixes them, the burden rests upon him of distinguishing one from the other. If he fail to do so, the whole will be held to belong to the trust. Vice-Chancellor Sir John Stuart in *Cook v. Addison* (*f*) said:—"It is a well established doctrine in this Court, that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so as that they cannot be separated with perfect

(*d*) 22 Ch. D. p. 754

(*e*) 4 N. Y. Sup. Ct. 412.

(*f*) L. R. 7 Eq. p. 470.

accuracy, he is liable for the whole. This doctrine was explained by Lord Eldon in *Lapton v. White* (g)." Confusion of property is conversion, and such misfeasance will render him responsible for loss occasioned by failure of the bank, where deposited, although the instrument creating the trust directed its deposit in that particular bank (h).

The American authorities in the main hold to the doctrine that failure to keep the property insured in a responsible company is not consistent with ordinary care in the management of the trust estate, and that the trustee is bound to take this precaution against loss. It would seem this was a wise rule. Surely a man of ordinary prudence would not suffer his own property to be subject to so great a hazard as total loss by fire, when its safety might be assured for a small outlay. The English authorities, however, fail to sustain this, as it would seem, salutary doctrine. Lewin, at p. 295 of his work, says:—"An executor has been held not to be answerable for having omitted to secure the safety of leasehold premises by insuring them against fire," citing *Baily v. Gould* (i) and *Dobson v. Land* (j). It has been held, under special circumstances, insurance might be justified: *Fry v. Fry* (k). Mr. Beven, in his excellent work on Negligence, at p. 1490, says:—"The question seems really to turn on what, in the existing state of opinion, and with reference to contemporary modes of life, is the reasonable thing to do; and whatever may have been the case in the year 1840, it would be a hard saying at the present day, and with the immensely diminished rate of insurance, to affirm that a prudent business man would not insure his property." It having for many years been considered doubtful whether trustees were justified in insuring trust property and paying the premiums out of income, the matter was finally set at rest by the Trustee Act, 1893. Section 18 of this Act provides:—

(g) 15 Ves. 482.

(h) *Corya v. Corya*, 119 Md. 593.

(i) 4 Y. & C. p. 221.

(j) 8 Hare p. 216.

(k) 27 Beav. p. 146.

“A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.”

The most difficult as well as important of the many duties of trustees is the investment of trust funds. This has ever proved a fruitful source of litigation. It has long since been settled that a trustee cannot lend on personal security, even if the creator of the trust had been in the habit of so doing.

In 1783 Lord Hotham said:—“The Court will always discourage lending trust money on private security, though large interest may be gained. It becomes a species of gambling:” *Adye v. Fouilleteau* (l). Lord Kenyon was no less emphatic: “It was never heard of that a trustee could lend an infant’s money on private security. This is a rule that should be rung in the ears of every person who acts in the character of trustee, for such an act may very probably be done with the best and honestest intention. Yet no rule of Equity is so well established as this:” *Holmes v. Dring* (m), (1788).

It may be laid down as a settled principle, that a trustee cannot, without breach of trust, in the absence of a clear, express, and imperative direction on the part of the settlor, lend trust funds on the security of a personal promise, or of personal property. Even if the instrument creating the trust empowers the trustee to invest the money “at the trustee’s discretion,” or “on such good security as the trustee can procure, and may think safe,” it would be held a breach of trust to lend upon personal security.

In *Jones v. Channell* (n) it was held that an investment on mortgage of leaseholds was a breach of trust, under a trust

(l) *Cox* p. 24.

(m) 2 *Cox* p. 1.

(n) 8 *Ch. D.* p. 493, (1878.)

to invest on real securities, unless the leaseholds were for a long term of years at a pepper corn rent, without onerous covenants. In delivering judgment, the Master of the Rolls, Jessel, enunciated the doctrine in these words:—"As a general rule, a trustee empowered to lend money upon real securities is not entitled to lend the money upon mortgage of a leasehold estate. By that I mean that *prima facie* it is a breach of trust." James, L.J., concurring, added:—"I think it is very desirable that trustees should be warned that they must not without express authority lend money upon leasehold securities."

The rule has long been that an advance of two-thirds of the value upon freehold property, and one-half on property of houses, is the only safe course for trustees to adopt in investing trust funds. Sir Charles C. Pepys, Master of the Rolls, as far back as 1835, in *Stickney v. Sewell* (o), referred to the rule in these terms:—"To advance two-thirds is admitted to be within the rule of ordinary prudence; but that is with reference to property of a permanent value. The same rule does not apply to property in houses, which fluctuates in value, and is always deteriorating."

*Ingle v. Partridge* (p) decided that in leasing upon mortgage the trustees should not lend upon a valuation made in behalf of the mortgagor. In his judgment in this case Sir John Romilly, M. R., said:—"A trustee cannot, with propriety, lend trust money upon mortgage on a valuation made by or on behalf of the mortgagor. If he does, and the valuer has *bona fide* valued the property at double its value, the trustee must take the consequences; he ought to have employed a valuer on his own behalf to see to it."

Kay, J., in *Olive v. Westerman* (q), thus explains the rule to be followed by trustees in making advances upon mortgage:—"No one ever said that the rule as to lending not more than one-half the value of house property was a hard and fast rule. Of course, when applying that rule all the circumstances must be looked at. But surely trustees when they

(o) 1 My. & Cr. p. 15.

(p) 34 Beav. p. 441.

(q) 34 Ch. D. p. 73.

are lending trust moneys upon house property—knowing, as I must take them to know, the rule, which has been certainly followed since 1836—should tell their valuers that they are lending trust moneys, and that they did not desire to lend more than one-half the actual value of the property. They should ask for a valuation which would enable them to judge whether they are justified in lending the amount they propose to lend.”

Trustees must not rest satisfied with the valuer's report; they are bound to bring their own judgment to bear upon the character and nature of the security. In *Learoyd v. Whiteley* (r), it appears, the trustees, in making an investment, acted on the advice of the valuers, not as to whether the land in question was a sufficient security for the sum they invested, but whether they, the trustees, were justified in investing upon the security of a speculative trading adventure. Lord Chancellor Halsbury thus commented upon their conduct:—“The forming a judgment on such a question was the duty of the trustees themselves—a duty which they cannot delegate to others.”

The last case in which the question underwent consideration was that of *Cocks v. Chapman* (s), described by Lindley, L. J., as “one of the most important cases which had been before the Court for years.” At the time of the testator's death there were certain outstanding mortgages belonging to the estate, the most of which were for two-thirds the price paid for the lands. The depreciation of agricultural lands in England set in about this time. The trustees under the will, hoping there might be a change for the better in the value of such lands, decided not to call in the moneys outstanding on these securities. Instead of improving, they gradually depreciated. This suit was brought to fasten upon the trustees liability for the loss which resulted to the estate by reason of not having sooner realized upon these securities. The trustees were held not liable. Lopes, L.J., thus laid down the law on this point:—“A trustee who is honest and reasonably competent is not to be held responsible for a mere error in

(r) 12 App. Cas. p. 732.

(s) [1896] 2 Ch. 726.

judgment, when the question which he has to consider is, whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence, and circumspection."

The Trustee Act, 1893, sec. 8, settles the terms and conditions upon which loans and investments made by trustees, on the security of any property, shall not become chargeable as breaches of trust. The section is as follows:—

"A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report."

A subsequent section of this Act limits the liability or loss by reason of improper investment to the difference between the actual investment and what at the time would have been a proper one, considering the then state of the property, with interest on this difference from the time the security was taken.

It may be laid down as a general proposition, that a trustee, if he has not been guilty of gross negligence or improper dealing, cannot be held responsible for the misfeasance of his co-trustee. The rule, however, is subject to this exception: if a trustee stand by and see a breach of trust committed by his co-trustee, or if he permit his co-trustee to deal with the trust money contrary to the trust he cannot escape liability: *Brice v. Stokes* (t). The Court in this case pointed out the distinc-

(t) 11 Ves. p. 319.



tion between trustees and executors. That, though where trustees or executors join in a receipt, *prima facie* all are presumed or considered to have received the money, yet it is competent for a trustee to exonerate himself by showing that the money acknowledged to have been received by all, was, in fact, received by one, and the other joined only for conformity. Not so with an executor; for with him it is not necessary to join with his co-executor in a receipt (as in the case of a trustee), and therefore if he do join, he is to be considered as assuming a power over the fund, and therefore answerable.

Sec. 20 of the Trustee Act, 1898, makes the receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power a sufficient discharge for the same, and exonerates the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof.

The rule that a trustee cannot make any profit out of his trust has been carried in England to the extent that he can not recover anything for his trouble and responsibility in the care and management of the trust estate. In *Power v. Meagher* (u), on appeal from the Supreme Court of Nova Scotia, the question was: Has a trustee under a will, in the Province of Nova Scotia, a right to a commission on the funds of the estate for his services, when no provision is made therefor in the will? It was held that the principle of the law of England that trustees were not allowed for their services, when remuneration was not expressly provided for, but that the same should be gratuitous, was clearly established by the authorities, and that the same principle was as applicable to Nova Scotia as to England, and as there did not appear to be any legislative authority or judicial decision to the contrary, it must be held to be the law of Nova Scotia until the same should be changed by the Legislature.

The authorities abundantly show that trustees cannot contract for their own benefit in regard to the subject of the

(u) 17 S. C. R. 287.

trust. That if they make profit, it will be held by them as a constructive trust for the benefit of the *cestui que trust*. All dealings of those who fill a fiduciary position with those benefitted by the trust, are watched with a jealous eye by the Courts.

The New Brunswick Legislature, in 1898, passed an Act enabling the Supreme Court in Equity to relieve a trustee from liability for any breach of trust, either wholly or partly, when he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust.

SILAS ALWARD.

St. John, N. B.

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## EDITORIAL REVIEW.

### **Professorship of Roman Law.**

We note the retirement of Mr. Proudfoot, formerly Vice-Chancellor and afterwards a Justice of the Chancery Division, from the professorship of Roman Law in the University of Toronto. Though not an old man, as men and particularly judges are reckoned now-a-days, he has been ten years off the bench, during which he found occupation in expounding his favorite subject. It is easy to believe that he took pleasure in the preparation and delivery of his prelections, and that they, like his judicial expositions of the law, were lucid and scholarly. He has well earned the period of repose which remains to him.

It is to be hoped that the appointment of Mr. A. H. Fraser Lefroy as his successor, though announced as temporary, will be made permanent. Unfortunately there are few men in Canada who devote much time to the abstract study of the law, and there is very little encouragement for those who do. Mr. Lefroy has found time, in the midst of the ordinary activities of a professional life, for study and authorship, and is possessed of the learning and enthusiasm necessary for a successful lecturer.

### **Appeals from the Divisional Courts.**

Some months ago we called attention to a case of *Farquharson v. Imperial Oil Company*, noted at p. 125 of the current Occasional Notes, in which, by an order of Mr. Justice Gwynne, an appeal was allowed to be taken direct from the judgment of a Divisional Court of the High Court of Justice for Ontario to the Supreme Court of Canada. See ante p. 99. There was an attempt to appeal to the Supreme Court from the order of Mr. Justice Gwynne in Chambers granting leave to appeal, but it was held that no appeal lay, and the main appeal was therefore proceeded with, heard, and ultimately allowed. See p. 372 of the Occasional Notes. Mr.

Justice Taschereau, however, expressed an opinion opposite to that of Mr. Justice Gwynne as to the meaning of "highest Court of final resort in the Province." As far as can be ascertained, none of the other Judges has attempted to place an interpretation upon these words since *Ste. Cunegonde v. Gougeon*, 25 S. C. R. 78. The position is far from satisfactory.

#### **The Court of Appeal for Ontario.**

This Court finished its last sittings for 1899 on the 9th of December. It sat for twenty days and heard twenty-eight cases. Some time, but not a great deal, was lost by reason of counsel not being ready in cases on the list. Perhaps if every moment of the twenty working days had been employed in hearing cases, a few more would have been heard, but only a few. The average result of a twenty days' sittings is the hearing of thirty cases, or a case and a half a day. This means about one hundred and fifty cases in the year, and that is probably as large a number as can be satisfactorily disposed of by one set of Judges. As things are at present, there seems, however, to be a waste of judicial strength. It is not necessary for all five Judges of the Court of Appeal, or for four of the five, to sit for the hearing of appeals from the judgments of single Judges; and, although it may be desirable for them to do so where it is possible, it is deferentially submitted that the state of the docket should be the criterion of possibility. Until arrearages are cleared off—there are fifty-one remanets from the last Court—surely it is in the interest of suitors that the Court should sit in two divisions of three Judges to each division. True, there are only five Judges in the Court, but for a year at least one Judge of the High Court could be detached from Divisional Court duty, and his circuit duties so arranged that they would not conflict with the sittings of the Court of Appeal, and his attendance could be thus secured to make up a second Court. There are ten Judges in the High Court—one more than is needed for Divisional Courts—so there is really no difficulty on the surface. Failing this plan, the

Sittings of the Court of Appeal might be prolonged and the great arrearage overtaken by the adoption of the oft-suggested course of keeping the Court down to three (in proper cases) and varying its make-up from day to day or week to week. Something must be done in the interests of all concerned, and this is the time to do it before the next half year's work for the High Court is arranged.

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## BOOK REVIEW.

AN ANALYTICAL SYNOPSIS OF THE CRIMINAL CODE AND OF THE CANADA EVIDENCE ACT, by James Crankshaw, B.C.L., Barrister, Montreal, author of "An Annotated Edition of the Criminal Code," and of "A Practical Guide to Police Magistrates and Justices of the Peace." Montreal; C. Theoret. 1899.

Mr. Crankshaw has placed lawyers and magistrates under fresh obligations by this admirable synopsis. It is designed more especially for the use of students, but we venture to prophesy that it will be found on the tables, not on the shelves, of those actively engaged in the administration of the Criminal law.

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THE  
CANADIAN  
LAW TIMES  
NOTES OF CASES

AND  
INDEX-DIGEST FOR 1899.

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# THE CANADIAN LAW TIMES

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## OCCASIONAL NOTES.

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Supreme Court of Canada.

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QUEBEC.]

[21ST NOVEMBER, 1898.]

GUERIN v. MANCHESTER FIRE ASSURANCE CO.

*Fire insurance—Conditions of policy—Notice—Proofs of loss—Change in risk—Insurable interest—Mortgage clause—Arbitration—Condition precedent—Foreign statutory conditions—R. S. O. c. 203, s. 168—Transfer of mortgage—Assignment of rights under policy after loss—Notice of assignment.*

A fire insurance policy provided, by a mortgage clause, that the insurance, as to the interest of mortgagees, should not be invalidated by neglect of the mortgagor or owner, nor by occupation of the premises for purposes more hazardous than permitted thereunder. The premises insured were at the date of the policy used as a dwelling-house, and the policy was indorsed with a statement that, "at the request of the assured," the loss, if any, was payable to the mortgagee "as his interest might appear, subject to the conditions of the above mortgage clause." The premises insured were situated in the province of Quebec, and the policy was subject to conditions taken from the Revised Statutes of Ontario and others, styled "Variations from Conditions." Four of the conditions in question were as follows:

"3. Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as

to the part affected thereby, unless the change is promptly notified in writing to the company, or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

“4. If the property insured is assigned without a written permission indorsed thereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession, or by the operation of the law, or by reason of death.”

Condition 13 provided for the usual notices and proofs and particulars of loss.

Another condition stipulated that no payment should be made until thirty days after completion of proofs of loss, and one of the “variations” added a condition that no action “against the company for any claim under the policy should be sustainable until after an award fixing the amount of the claim,” as therein provided.

Prior to the loss, the mortgages were transferred to the plaintiff, but the policy was not transferred to him. After the loss happened, the mortgagee assigned to the plaintiff all his right, title, and interest in the policy, and subrogated him in all rights against the company thereunder, and authorized him to collect the claims arising from the loss. The evidence failed to shew that notice of the assignment had been given to the company, or that notice and proofs of loss or value of the premises destroyed had been made in form and effect as required by the conditions. It was shewn, however, that the occupation of the premises had been changed without the knowledge or consent of the company, and at the time of the loss that they were and for some time had been used as a tavern.

In an action by the assignee to recover the amount of the insurance :—

*Held*, that the policy had been avoided by the unauthorized change in the occupation of the insured premises, by the absence of interest in the mortgagee at the time of loss, by failure to give notice of the assignment, by failure to give notice and make proofs of loss and of the value of the premises destroyed, according to the terms of the policy, and that the action could not be maintained against the company, in the absence of signification of the assignment of the claim as required by Art. 1571 of the Civil Code.

*Held*, further, that an award, pursuant to the conditions of the policy, fixing the amount of the claim, was a condition precedent to any right of action thereunder against the company.

TASCHEREAU, J., dissented from that part of the opinion of the majority of the Court which related to the failure of proofs and notice of loss, the unauthorized change in the premises, and the necessity of an award, and held that the mortgage clause rendered such failure and neglect ineffectual as against the mortgagee's rights, but concurred in the judgment dismissing the appeal with costs, on the ground that the mortgagee named in the indorsement had no insurable interest in the property insured at the time of the loss, and consequently had no rights under the policy, and could assign no right of action to the plaintiff; doubting, however, whether the Courts of the Province of Quebec could have power to declare variations from the conditions imposed by the Ontario statute reasonable or unreasonable under the provisions of that statute.

*Rielle and Madore*, for the appellant.

*Martin*, for the respondents.

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NOVA SCOTIA.]

### WALLACE v. HESSLEIN.

*Vendor and purchaser—Specific performance—Laches—Waiver.*

The purchaser under a contract for sale of land is not entitled to a decree for specific performance by the vendor

unless he has been prompt in the performance of the obligations devolving upon him, and always ready to carry out the contract on his part within a reasonable time, even though time was not of its essence; nor when he has declared his inability to perform his share of the contract.

The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements.

*Wallace*, appellant in person, and *Sinclair*, for the appellant.

*Borden*, Q.C., for the respondent.

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### Exchequer Court of Canada.

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#### BRITISH COLUMBIA ADMIRALTY DISTRICT.

[McColl, Loc.J., 28TH NOVEMBER, 1898.]

#### REGINA v. THE "OTTO."

*Maritime law—Behring Sea Award Act, 1894—Illegal sealing—Unintentional offence—Nominal fine.*

Where the owner of a ship employs a competent master, and furnishes him with proper instruments, and the master uses due diligence, but, for some unforeseen cause, against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden, the Court may properly exercise its discretion to impose a nominal fine only.

*C. E. Pooley*, Q.C., for the Crown.

*E. V. Bodwell*, for the defendants.



## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

FALCONBRIDGE, J.]

[28TH DECEMBER, 1898.]

PORT ARTHUR HIGH SCHOOL BOARD v. TOWN OF  
FORT WILLIAM.*Schools—High schools—Pupils from adjacent municipality—Mandamus.*

Under its Act of incorporation, 57 V. c. 57 (O.), the town of Port Arthur has the same rights and powers in regard to the organization and maintenance of high schools as other incorporated towns.

A board of trustees of a high school may be appointed by resolution of the municipal council having jurisdiction; a by-law is not necessary.

*In re Dawson and Sault Ste. Marie*, 18 O. R. 556, disapproved.

Judgment of FALCONBRIDGE, J., ordering the town of Fort William to pay to the Port Arthur School Board a proportion of the cost of maintenance of the high school in respect of pupils residing in the town attending the high school affirmed, but that part thereof directing a mandamus to the mayor and councillors of the town to pass a resolution to the treasurer to pay the amount, struck out as unnecessary.

*George Bell* and *T. C. Thomson*, for the appellants.

*Aylesworth*, Q.C., for the respondents.

## HIGH COURT OF JUSTICE.

[FERGUSON, ROBERTSON MEREDITH, JJ., 4TH NOVEMBER, 1898.]

McRAE v. McRAE.

*Will—Restraint on alienation—Invalidity—Time limit.*

Devise of real estate to a son, with condition as follows: "But I direct that before my said son . . . shall sell, mortgage, trade, or dispose of, or incumber, the said property, or any part thereof, or any farm produce or timber, he shall first obtain the consent of my sister. . . ."

*Held*, reversing the judgment of FALCONBRIDGE, J., MEREDITH, J., dissenting, that the restriction was against all kinds of alienation, and in that regard absolute and unlimited, and, as the required consent was a condition precedent to any kind of alienation and unlimited as to time, the restraint was void.

*Per* MEREDITH, J.—The restraint on alienation is limited in point of time to the sister's lifetime, and *Earls v. McAlpine*, 6 A. R. 145, compels me to hold it, so limited, to be a valid condition.

*J. G. Harkness*, for Duncan Angus McRae, the appellant.  
*Leitch*, Q.C., for the plaintiff.

[BOYD, C., ROBERTSON, J., 12TH DECEMBER, 1898.]

*In re* McINNES v. McGAW.*Receiver—Equitable execution—Interest under will—Interference with discretion of executors—Prohibition—Division Court.*

The mother of the judgment debtor by her will empowered her executors, if in their discretion they should see fit, to pay the income of her estate, in part or whole, to and for his benefit and advantage, at such time and in such manner and sums as they should see fit, leaving it to their option and discretion whether they should pay him any sum.

An order was made in a Division Court action, after judgment, appointing the judgment creditor receiver to receive the amount of his judgment from his executors, whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment, or any part thereof.

Prohibition was granted against the enforcement of this order.

*Held*, following *The Queen v. The Judge of the County Court of Lincolnshire*, 20 Q. B. D. 167, that if the order was intended to interfere with the action of the executors, it should not have been made; and if it did not so interfere, it was nugatory.

*W. J. Elliott*, for the judgment creditor.

*Shepley*, Q.C., for the executors.

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[FALCONBRIDGE, STREET, JJ., 14TH DECEMBER, 1898.]

### BERNESKI v. TOURANGEAU.

*Solicitor's lien—Attaching order—Priorities—Waiver of lien.*

The lien of a solicitor upon a verdict recovered for his client **will** prevail against an attaching order obtained by a creditor of the client.

*Sheppey v. Grey*, 28 W. R. 877, followed.

But, in the circumstances of this case, where the defendant had paid over to an attaching creditor of the plaintiff the amount of the verdict recovered by the plaintiff, under the full belief that he was obliged to do so, and that the plaintiff's solicitors had no right to prevent the attaching creditor from recovering the money, and the solicitors had conducted to this belief by their neglect to enforce their rights, the solicitors were not allowed to claim payment over again from the defendant.

*F. C. Cooke*, for the plaintiff's solicitors.

*F. E. Hodgins*, for the defendant.

[19TH DECEMBER, 1898.]

*In re* REGINA v. TORONTO R. W. CO.

*Prohibition—Police magistrate—Jurisdiction over incorporated company—  
Enforcement of conviction—Service of summons—Municipal Act, s. 705  
—Criminal Code, ss. 562, 637, 853, 858.*

On appeal by the defendants from the order of ROSE, J., 18 Occ. N. 412, refusing a motion for prohibition to the police magistrate for the city of Toronto to prohibit him from proceeding with the hearing of a charge against the defendants of committing an offence against a by-law of the city of Toronto passed under the Municipal Act, R. S. O. c. 223, s. 569, s.-s. 4, requiring the defendants to provide enclosed vestibules upon their street cars, upon the ground that the defendants, being an incorporated company, were not subject to the summary jurisdiction of the magistrate as given by s. 705 of the Municipal Act, but could only be prosecuted by indictment, and the offence was not an indictable one:—

*Held*, that the provisions of the Criminal Code applied, in regard to offences punishable by summary conviction, to corporations as well as to natural persons.

The objection that the portion of the remedy provided for the recovery of the penalty and costs, by imprisonment in default of distress, was inapplicable to corporations, was not entitled to weight, because it was not a necessary part of the conviction.

*Rex v. Gardner*, 1 Cowp. 79, and *Regina v. Birmingham and Gloucester R. W. Co.*, 3 Q. B. 223, referred to.

It is the duty of the Courts, in the absence of special directions as to the manner in which corporations are to be served with summonses, to see that they are properly brought to their notice; but the absence of special directions does not shew that summonses cannot be served upon corporations. Section 637 of the Code shews what is considered proper service of notice of an indictment, and there is no reason why similar notice should not be good in the case of a summons.

*J. Bicknell*, for the defendants.

*Fullerton*, Q.C., for the complainants.

## CONFEDERATION LIFE ASSOCIATION v. LABATT.

*Parties—Conversion of goods—Relief over—Third party—Vendor—Rule 209.*

In an action for the conversion of goods, the defendant may bring in the person who sold him the goods as a third party, the words “any other relief over” in Rule 209 being wide enough to include the claim made by the defendant against his vendor.

Rowell, for the defendant.

Kilmer, for the third parties.

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[ARMOUR, C.J., 28TH DECEMBER, 1898.]

## HASLEM v. SCHNARR.

*Liquor License Act—License commissioners—Mandamus—Issue of license—Discretion—Judicial exercise of—Number of licences allowed by law.*

Motion by the plaintiff for an order commanding the defendants, the license inspector and the license commissioners for the district of Rainy River North, to do all or any such acts, matters, or things as should be necessary to grant or secure to the plaintiff a tavern license for his tavern known as the “Club House Hotel,” in the town of Rat Portage.

*Held*, that the Act to protect justices of the peace and others from vexatious actions is not applicable to an action such as this, viz., for the same relief as the motion, and for damages as subsidiary relief, so as to require notice of action.

*Leeson v. License Commissioners of Dufferin*, 19 O. R. 67, not followed.

License commissioners have in the exercise of their functions a wide discretion, but a discretion which must be exercised judicially, and this Court has ample power to compel them to exercise their functions in a judicial manner; and here the defendants the license commissioners were acting unfairly in rescinding their resolution of the 6th September, 1898, granting the plaintiff a license, for the sole reason that they desired to grant it to a subsequent applicant.

The difficulty in the plaintiff's way was that the license had now been issued to the subsequent applicant, and to order the issue of a license to the plaintiff now, would be ordering such issue in excess of the number limited by law.

Motion and action dismissed without costs.

*W. N. Ferguson*, for the plaintiff.

*Rodwell*, for the defendants.

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[FERGUSON, J., 22ND DECEMBER, 1898.]

*In re* BEATTIE, BEATTIE v. BEATTIE.

*Administration—Insolvent estate of private banker—Claim for amount of promissory note collected—Priority—Appropriation.*

An appeal by J. C. Thom, a creditor of the estate of John Beattie, deceased, from the report of the Master at Guelph, upon the administration of the estate, which was insolvent. The appellant was placed by the Master upon the list of creditors, as an ordinary creditor. He appealed upon the ground that he was entitled to payment of his claim in full, in priority to other creditors.

The appellant, shortly before the death of John Beattie, who was a private banker at Fergus, sent him two promissory notes with instructions to receive payment from and hand the notes over to the makers and remit the amount paid to the appellant at Woodbridge. The deceased collected \$361.20 upon the notes, and drew a cheque for the amount upon the Traders' Bank of Canada at Toronto in favour of the appellant, and sent it to him on the 20th March, 1897. There were funds to the deceased's credit in the Traders' Bank, but he died on the 21st March, and the cheque being presented after his death, the bank refused to pay it.

*Skeans*, for the appellant, contended that there was an appropriation of the money in his favour by means of the cheque, citing *Farley v. Turner*, 26 L. J. N. S. Ch. 710, and *In re Barned's Banking Co.*, 39 L. J. N. S. Ch. 635; or that the deceased was simply an agent to transmit the money, and it never became his money, but was always the appellant's money, and could not be retained as part of the estate of the deceased for the benefit of the general creditors.

*A. Faskin*, for the executors, and *J. Grayson Smith*, for certain of the creditors, opposed the appeal.

FERGUSON, J., distinguished *Farley v. Turner*, in view of the circumstance that there was no evidence here to show that the money collected by the deceased was deposited in the bank or set aside or ear-marked in any way. The other case cited was against the appellant. There was no specific appropriation in his favour, and he was in no better position than any other creditor.

Appeal dismissed without costs.

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[24TH DECEMBER, 1898.]

*In re* TRUSTEES OF SCHOOL SECTION II., AMARANTH,  
AND COUNTY OF DUFFERIN.

*Public schools—Union school section—Alteration of boundaries—Five years' limit—R. S. O. c. 292, ss. 38, 43, 44.*

In 1897 a township council passed a by-law altering the boundaries of an existing school section, and this was affirmed by the county council on appeal. In 1898 the county council, on appeal from the refusal of the township council to do so, appointed arbitrators to consider the advisability of forming a union school section from parts of the section in question and of another section, and an award was made setting apart the new union section, and thereby making material alterations in the boundaries of the existing section.

*Held*, that, although the by-law of 1898 was passed under ss. 43 and 44 of the Public Schools Act, R. S. O. c. 292, it came within the prohibition of s. 38, s.-s. 3, which required that the by-law of 1897 should remain in force for five years; and therefore the by-law of 1898 was quashed and the award set aside.

*Aylesworth*, Q.C., and *G. M. Vance*, for the applicants.

*W. L. Walsh*, for the respondents.

[28TH DECEMBER, 1898.]

*In re* THOMAS AND SHANNON.

*Will—Devise—Restraint on alienation—Repugnancy—Invalidity—Contingent executory interest—Remoteness—Perpetuities—Title by possession.*

Petition by a vendor, under the Vendor and Purchaser Act, for an order declaring that the petitioner could make a good title in fee simple to certain lands in the township of Haldimand.

The petitioner derived title under the last will of his father. In the early part of the will the lands were devised to the vendor in fee, and other lands were devised to other children, but in the latter part of the will there was this clause: "It is fully understood that my children have no power to make sale or mortgage any of the lands mentioned, but to go to their heirs and successors. . . . Should any of my children die childless, leaving husband or wife, said husband or wife to have a third during the term of their natural life."

*Held*, that the first part of this clause amounted to a total restriction upon alienation, and was repugnant to the nature of the estate given by the devise, and was therefore void.

*Held*, that the words "die childless" in the last part of the clause should be taken to mean "die not having children or a child living at the time of such death;" and this part of the clause created a contingent executory interest or estate of freehold, which, from its legal nature, would, upon the contingency happening in its favour, spring up into existence, thus defeating, so far as might be necessary for its existence and duration, the estate in fee devised to the petitioner; and, although not a probable event, the petitioner having many children, and a wife willing to join in a conveyance, it was possible that a future wife might survive him, and his children be at the time of his death all dead.

*Held*, also, that although many children of the vendor were now living, none of whom was born till many years after the testator's death, and all of whom must die before the executory interest could take effect, yet the gift was not too remote, and did not infringe upon the rule against perpetuities.



*Held*, also, that the long and continued possession and occupation of the vendor did not make any difference in his favour.

Order declaring that the vendor could not make a good title to the purchaser.

*Clute*, Q.C., for the vendor.

*E. D. Armour*, Q.C., for the purchaser.

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[30TH DECEMBER, 1898.]

### HIGGINSON v. KERR.

*Will—Construction—Legacy—"Cousins"—Indefinite disposition—Trust—Power of appointment—General power.*

The testator died a bachelor, leaving no relations nearer than first cousins. By his will he gave certain specific legacies, one of which was, by clause 7, "to each of my cousins" the sum of \$1, and then proceeded:—

"9. I desire that my executors herein named shall have full power to make such and any disposition of the residue and remainder of my property and estate as they, in their judgment, may deem best, and to make due inquiry into the financial and social standing of my relations in Ireland, and, after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they, in their judgment, consider best, to such relations.

"10. I also give my said executors power and desire them to dispose of any balance of my estate or property which may be in the bank or in any securities, to the best of their judgment, where they may consider it will do the most good and deserving.

"12. I also give my executors power to hold property in trust for any of my friends whom they may think proper."

By clause 1 he appointed four of his neighbours executors and trustees of his will.

*Held*, that the word "cousins" in clause 7 must be taken to mean first cousins only.

2. That clause 9 did not contain a gift of the residue, but a power to make disposition of it. Both the subject and object of this disposition were left undefined and wholly in the discretion of the executors, and the disposition was therefore void, and no trust was created in favour of the relations in Ireland. The power given by clauses 9 and 10 was a general power over the residue, without the creation of a trust. The executors were given an absolute power of appointment in respect of the residue, which they might exercise in favour of themselves or any other person or persons; and the heirs or next of kin could not successfully, as upon an intestacy, make any claim upon the residue, unless in case of default of appointment.

3. The fact that the executors were in clause 1 called "executors and trustees," and by clause 12 empowered to hold property in trust for any friends of the testator as they might think proper, did not show that the residue was held by them in trust or that there was any trust connected with the power given.

*Aylesworth*, Q.C., for the plaintiffs, the executors.

*E. J. Reynolds*, *Ludwig*, and *G. C. Biggar*, for the several defendants.

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[MEREDITH, J., 21ST DECEMBER, 1898.]

*In re* CRAIG AND LESLIE.

*Execution—Order of Master of Titles—Land Titles Act, ss. 91, 92—Order of Court—Receiver—Equitable execution.*

Upon the proper construction of s. 92 of the Land Titles Act, R. S. O. c. 138, a person entitled to payment of costs under an order of a Master of Titles made by virtue of s. 91, can have "execution issued" by the proper officer, upon the order and certificate of the Master, without any order of the High Court directing or permitting it; and the practice of the High Court in regard to issuing execution is made applicable by the words of the section, "in the same manner in all respects as if the order made by the Master were the order of the Court;" and by that practice "issuing execution" means issuing such *process* as, under the Consolidated

Rules, is applicable to the case: see Rule 836: and does not include that mode of enforcing payment, by way of a receiver, usually called "equitable execution."

And, even if an application to the Court were necessary in order to have "execution issued," those words would not include the appointment of a receiver.

*In re Shephard*, 43 Ch. D. 131, *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154, and *Norburn v. Norburn*, [1894] 1 Q. B. 448, followed.

*H. L. Dunn*, for the applicants.

*G. G. S. Lindsey* and *W. C. Hall*, for the respondents.

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## IN CHAMBERS.

[FERGUSON, J., 20TH DECEMBER, 1898.]

*In re* CARBERY.

*Life insurance—Benefit of wives and children—Apportionment—Will—Abatement.*

Motion by Emma Carbery, one of the adult children of the late Thomas Carbery, for payment out of Court to her of her share of certain insurance moneys paid in by the insurance companies after the death of Thomas Carbery, the assured, on the 20th July, 1898, leaving a will dated the 25th June, 1897.

The testator had three policies upon his life, each for \$2,000, making in all \$6,000. By each of the policies the money was made payable to the wife and children, and, if no change had been made, they would have been entitled in equal shares to the whole of the money. There were nine children, and therefore ten persons to receive as beneficiaries, and, had the policies all been good, these ten beneficiaries would have been entitled each to \$600. The testator by his will dealt with these insurance moneys as if they were part of his personal property, and he gave a specific sum to each of eight of his children, some of the sums being more and some less than \$600, the total given being \$5,100. In doing this the testator said nothing as to his wife or the other child, Thomas Evans Carbery.

The power which the testator had, under s. 160 of the Ontario Insurance Act, was to "make or alter the apportionment" of the moneys.

*Held*, that what he did by his will was a re-apportionment of them; and the former apportionment remained, except so far as it was changed by the re-apportionment. Had the policies all been good, each of the eight children would have been entitled to the specific sum given him or her by the will, and the wife and the other child would have been entitled, by virtue of the original apportionment in their favour, varied by the reapportionment, to the \$900 balance divided between them equally. But, as one of the policies turned out to be worthless, and there was only \$4,000 to distribute, the sum going to each of the beneficiaries must abate in due proportion.

Order made for payment to Emma Carbery of her proper proportion according to the above disposition. The other persons entitled might come in for similar orders or might be embraced in this order on the settling of it.

*W. L. Walsh*, for the applicant.

*F. W. Harcourt*, for the two infant children of the testator.

*R. McKay*, for the widow and Thomas Evans Carbery.

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[STREET, J., 7TH DECEMBER, 1898.]

CASSELMAN v. OTTAWA, ARNPRIOR, AND PARRY  
SOUND R. W. CO.

*Discovery—Examination of officer of railway company—Roadmaster.*

In an action for damages for the death of the plaintiff's husband, who was killed while on duty as a fireman on a train of the defendants, an incorporated company, owing to the displacement of a switch:—

*Held*, that the roadmaster in charge of the section of the line in which the accident occurred, although he was under the control of the chief engineer, was an officer of the company examinable for discovery.

*J. L. McDougall*, for the plaintiff.

*C. J. R. Bethune*, for the defendants.

## NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[GRAHAM, E.J., 27TH DECEMBER, 1898.]

McKENZIE v. McLEAN.

*Action—Dismissal for want of prosecution—What must be shewn—Discretion.*

Motion by the defendant for an order dismissing the action for want of prosecution. The affidavit of the defendant's solicitor showed that no reply had been delivered nor notice of trial served within six weeks after the last pleading.

*D. McNeill*, for the defendant, stated that notice of motion had been served upon the plaintiff's solicitor, and the instructions to counsel were that the motion would not be opposed.

No one appeared for the plaintiff.

GRAHAM, E.J.—The Rules, no doubt, provide for the dismissal of actions under these circumstances, but it is not our practice to act upon them in all cases. It will be better to get the plaintiff's consent to have the action dismissed. At any rate, the affidavit does not state the nature of the action, and consequently I am unable to exercise the discretion I believe I have.

Motion adjourned.

## REGINA v. MOONEY.

*Justice of the peace—Summary conviction—Trial before one justice—Commitment signed by two.*

The defendant was convicted of larceny, and sentenced to three months' imprisonment. Upon the return of a writ of *habeas corpus* a motion was made for his discharge upon the following grounds: 1. That the commitment did not

recite that the prisoner had elected to be tried summarily. 2. That the sentence, as expressed in the commitment, was imprisonment only in default of payment of an imposed fine, for which there was no authority. 3. That the trial was before one magistrate only, although the commitment was signed by two. This was shown by an affidavit of the prisoner.

The prisoner was discharged upon the third ground.

No opinion was expressed as to the first ground: see *Regina v. Sears*, 17 Occ. N. 1240.

The second ground was not tenable: s. 958 of the Criminal Code.

The order discharging the prisoner was made without costs, and upon condition of no action being brought.

*J. J. Powers*, for the prisoner.

No one appeared for the Crown.

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### COUNTY JUDGE'S CRIMINAL COURT.

[JOHNSTON, Co.C.J., 16TH DECEMBER, 1898.

REGINA v. WOODS.

*Criminal law—Summary trial—Election—Amended charge—Refusal to plead.*

The defendant was committed for trial "for that he did offer for sale a certain lottery ticket," contrary to s. 205 (b) of the Criminal Code. He was arraigned, and elected to be tried summarily. Afterwards, on the day set for the trial, the Crown prosecutor caused an amended charge to be read to the accused, for the purpose of having him plead to it. This charged him with selling lottery tickets and causing them to be sold. The prisoner refused to plead to the amended charge, and would consent to be tried summarily only upon the original charge.

*W. F. O'Connor*, for the prisoner, supported the objection and referred to *Goodman v. Reginam*, 3 O. R. 18.

*H. W. Blackadar*, for the Crown.

PER CURIAM:—Objection sustained.

## MANITOBA.

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## In the Queen's Bench.

[FULL COURT, 28<sup>RD</sup> DECEMBER, 1898.]

## DAY v. RUTLEDGE.

*Security for costs—Appeal to Supreme Court of Canada—Payment out of money paid in as security.*

The plaintiff, being resident out of Manitoba, was ordered to give security for the costs of the defendants, and so by paying money into Court. At the trial judgment was given against the defendants, with costs, and, upon appeal to the full Court, this was affirmed with a variation, and one of the defendants, Lawlor, was ordered to pay the costs of the appeal. Lawlor appealed to the Supreme Court of Canada, but the plaintiff applied for a return of the money paid into Court, notwithstanding the pending appeal. This was refused in Chambers, and the plaintiff appealed to the full Court.

*Held*, following *Hamill v. Lilley*, 56 L. T. N. S. 620, that the money should be paid out to the plaintiff.

*Marsh v. Webb*, 15 P. R. 64, also referred to.

*Mulock*, Q.C., for the plaintiff.

*Ewart*, Q.C., for the defendant.

## BRITISH COLUMBIA.

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In the Supreme Court.

IN CHAMBERS.

[IRVING, J., 6TH DECEMBER, 1898.]

*In re* SOLICITOR.

*Solicitor—Taxation of bills of costs—Offer to take less than amounts of bills delivered—Effect of, on result of taxation.*

The solicitor delivered several bills, one of them for \$272.32, at the bottom of which he wrote "say \$250;" another for \$104.65, at the bottom of which was written "say \$45;" another was delivered at \$13.56, but with it the solicitor wrote a letter stating that he would not claim the amount of it. The different accounts were, by the common order, referred to the taxing Master for taxation and report. The Master certified that the amount of the bills presented for taxation was \$615.55, and the amount taxed off was \$113.47; the \$13.56 bill was disallowed, the Master not stating in the report his reason for disallowance.

The solicitor took out a summons for an order directing the taxing Master to tax the costs of the reference to him, on the ground that one-sixth had not been taxed off.

*R. M. Macdonald*, for the solicitor, contended that, as he had notified the client that he would not claim the \$13.56, and also that the different accounts having the words "say \$250" and "say \$45" should be understood as offers to accept those amounts, and as the client had not succeeded in reducing the bill below the amounts named, he could not contend that one-sixth had been struck off.

*S. S. Taylor*, Q.C., for the client, contended, upon the authority of *In re Carthew*, 27 Ch. D. 485, and *In re Cameron*,



13 P. R. 173, that the solicitor could not rely upon a previous offer to take less than the amount found to be due; and as to the \$13.56 bill, the solicitor should have declined to proceed with the taxation of it, and have relied upon his letter offering to withdraw that account; but, having in all cases proceeded to tax regardless of the different offers, he could not take advantage of such.

IRVING, J., considered the authorities cited conclusive, and discharged the summons with costs.

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[8TH DECEMBER, 1898.]

### HOEPPNER v. HODGINS.

*Notice of trial—Close of pleadings—Counterclaim—Defence—Reply.*

The plaintiff gave notice of trial under Rules 345 and 346 of the B. C. Rules of 1890, for the tenth day after the first day of the sittings at Nelson. These Rules in part are as follows: "Notice of trial before a Judge, with or without a jury, in Victoria, shall be deemed to be for the day named in such notice, or for the soonest period thereafter at which the action can be conveniently tried. . . . Sittings of the Court in Victoria, for trial of issues, with or without a jury, shall, so far as is practicable, be held as often as the business to be disposed of may render necessary. This Rule shall also apply to trials in any portion of the Province (other than Victoria) in which effect can be given to it. . . . Except as provided at the end of the last Rule, notice of trial . . . elsewhere than in Victoria . . . shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given."

The action was commenced to recover an amount for architect's commission, and the defence was delivered in due course, with a counterclaim for moneys paid by mistake. The plaintiff delivered a reply, and notice of trial was served on the 15th day after delivery of the reply to the defence and counterclaim.

The defendant issued a summons to strike out the notice of trial.

*J. H. Bowes*, for the defendant, contended that the notice should have been for the first day of the sittings of the Court at Nelson, and not for a day ten days after the first day of the sittings; and (2) that the pleadings were not closed. He also relied upon Rules 223, 224, 225, and 226, contending that he had 21 days to reply to the plaintiff's defence to the counterclaim contained in the reply.

*S. S. Taylor*, Q.C., for the plaintiff, disputed the right of the defendant to reply to the defence to the counterclaim, and also relied upon Rules 339 and 343, which read as follows :

Rule 339—"Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply, if any, whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial."

Rule 343—"Notice of trial shall be given before entering the case for trial; and the case may be entered notwithstanding that the pleadings are not closed, provided notice of trial has been given."

IRVING, J., held that the notice of trial was good, and discharged the summons with costs.

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## Exchequer Court of Canada.

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### QUEBEC ADMIRALTY DISTRICT.

[ROUTHIER, LOC. J., 30TH NOVEMBER, 1898.]

#### COORTY v. THE "GEORGE L. COLWELL."

*Maritime law—Necessaries supplied to foreign ship in foreign port—Owners domiciled out of Canada—International law—Commercial matter—Action in rem.*

The Exchequer Court of Canada, under the provisions of 24 V. c. 10, s. 5, may entertain a suit against a foreign ship within its jurisdiction for necessaries supplied to such ship in a foreign port, not being the place where such ship is registered, where the owners of the ship are not domiciled in Canada.

*Cory v. The "Mecca,"* [1895] P. 95, followed.

2. Under the principles of international law, the Courts of every country are competent, and ought not to refuse, to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters; and is declared in the provisions of Art. 14, C. C. P., L. C., and Arts. 27, 28, and 29, C. C., L.C.

*Taschereau*, for the plaintiffs.

*Pentland*, Q.C., for the defendants.

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### BRITISH COLUMBIA ADMIRALTY DISTRICT.

[MCCOLL, LOC. J., 13TH JANUARY, 1899.]

#### WILLIAMSON v. THE "MANAUENSE."

*Ship—Mortgage—Action to enforce—Interim receiver—Jurisdiction.*

This was an action *in rem* against the British ship "Manauense" by R. Williamson & Son, of Liverpool, to enforce

a mortgage. The ship was registered in Liverpool. In the action the ship was under arrest, and an appearance having been entered by Thomas Tolson Edwards, registered owner, pleadings were delivered, the plaintiffs claiming under the mortgage, and the defendant Edwards alleging that the ship was held on partnership account between himself and the plaintiffs. The plaintiffs now applied for the appointment of a receiver to take possession of and operate the ship until the trial.

*F. Peters*, Q.C., for the motion.

*J. M. Bradburn*, for the defendant, contended that the Court had no jurisdiction to appoint a receiver except in an action of co-ownership.

THE LOCAL JUDGE held that the jurisdiction of the Exchequer Court in Admiralty as to the appointment of receivers and granting of injunctions is not limited to co-ownership actions; the Court has a like jurisdiction with the High Court of Justice in England under the Judicature Acts, and will appoint a receiver whenever it is just and convenient.

Order made appointing W. A. Ward receiver.

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## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[24TH JANUARY, 1899.

SMITH v. BOYD.

*Amendment — Pleadings — Trial — Partnership — Conspiracy — Account —  
• Parties.*

In an action for damages for a conspiracy in pursuance of which the defendants, as alleged, fraudulently withdrew moneys from the assets of a firm of which the plaintiff was a member:—

*Held*, reversing the decision of a Divisional Court, 18 P. R. 76, 18 Occ. N. 107, that leave to amend by adding the assignee of the firm for the benefit of creditors as a party and by claiming an account of the moneys withdrawn by the defendants, was properly refused at the trial.

*Delamere*, Q.C., for the appellant.

*Du Vernet* and *H. L. Dunn*, for the respondent.

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[27TH JANUARY, 1899.]

### MINHINNICK v. JOLLY.

*Fixtures—Negotiations for sale—Intention to sever—Subsequent purchaser of freehold—Rights of.*

Order of a Divisional Court, 29 O. R. 238, 18 Occ. N. 135, affirmed on appeal.

*Robinson*, Q.C., and *Moore*, for the appellant.

*Aylesworth*, Q.C., for the respondent.

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### HIGH COURT OF JUSTICE.

[*Boyd*, C., *Ferguson*, J., *Meredith*, J., 17TH NOVEMBER, 1898.]

#### *In re* SOULES.

*Will—Construction—Survivorship—Children attaining majority—Death or marriage of widow—Shares vesting.*

The testator by his will gave his residuary estate to his executors upon trust to make provision for the support and maintenance of his family and for their education until his youngest surviving child should attain twenty-one years of age, when it was to be divided by the executors, by their setting apart one-third thereof for his widow during her widowhood or until she remarried, and the remainder two-thirds to his surviving children, in portions of four parts to the sons and three parts to the daughters; and after the death or remarriage of his widow, the said one-third was to be divided among his surviving children in the proportions

aforesaid. The widow survived the testator, but died before the youngest child attained the age of twenty-one years.

*Held*, that the words of survivorship referred to the period of distribution, namely, the youngest child attaining twenty-one years of age, and, therefore, only the children then living were entitled to share in the residue, and this applied as well to the shares to be taken by the children as to the share set apart for the widow.

*A. G. F. Lawrence*, for the executors.

*G. G. S. Lindsey* for representatives of deceased children.

*L. F. Heyd*, for adult children.

*A. J. Boyd*, for the infant children.

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[MEREDITH, C.J., ROSE, J., MACMAHON, J., 15TH DECEMBER, 1898.]

### REGINA v. COLEMAN.

*Criminal law—Committal for one offence—Change of venue—Trial for two offences—Administering oath—Validity of—Comment by Judge on prisoner not testifying—Jury recalled—Comment withdrawn—Prisoner's right—Substantial wrong—New trial.*

A prisoner was committed for trial in the county of D. upon a charge of perjury, alleging a single offence. The venue was changed to the county of P., where he was tried upon an indictment with two counts, alleging two offences arising out of the same matter, and found guilty on both. The evidence of both had appeared before the committing magistrate.

*Held*, that there was jurisdiction to try for both offences in the county of P.

On the occasion when the perjury was alleged to have been committed the oath was administered to the prisoner in open Court by the clerk of the County Court, sitting in the General Sessions of the Peace for and at the verbal request of the clerk of the peace.

*Held*, that the repeating of the words of the oath in open Court, with the assent of the presiding Judge, is the act of

the Court, and the assent of the witness equivalent to the repetition of the words by him, and that the witness was properly sworn.

At the trial the prisoner did not testify on his own behalf, and trial Judge in his charge to the jury commented upon that fact, although when his attention was drawn to it he recalled the jury and withdrew his comment.

*Held*, that the prisoner had a right to have his case submitted to the jury without the comment, and being deprived of that right, there was a substantial wrong done to him, and it could not be undone by calling back the jury and withdrawing the comment; and a new trial was ordered.

*J. R. Cartwright*, Q.C., for the Crown.

*E. F. B. Johnston*, Q.C., for the prisoner.

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[FALCONBRIDGE, J., STREET, J., 29TH DECEMBER, 1898.]

TRUSTS CORPORATION OF ONTARIO v. CITY OF  
TORONTO.

*Money paid under mistake of fact—Payment of taxes—Recovery back—Action.*

The plaintiffs, having been appointed in 1896 new trustees of a marriage settlement, received from the agent of the former deceased trustee, a list of lands belonging to the estate, and certain notices of assessment of taxes thereon. Finding such a notice in regard to one of the lots of land for the taxes for 1896, they paid these taxes to the collector in August, 1896. As a fact, the lot had been sold for taxes accrued prior to 1896, in the previous March, which the plaintiffs first became aware of in January, 1897. The arrears exceeded the value of the land, and the plaintiffs did not redeem, but brought this action to recover back the money paid, as paid under a mistake of fact.

*Held*, affirming the decision of MORGAN, J. of York, that the action must be dismissed, for there was never any liability on the plaintiffs to make the payment in question, and even if there had been no arrears and no sale for taxes, they could not have been any the more liable to pay, and therefore the mistake was not such as entitled them to recover the money back.

*Aiken v. Short*, 1 H. & N. 210, and *Chambers v. Mills*, 13 C. B. N. S. 125, followed.

*Aylesworth*, Q.C., and *G. C. Heward*, for the plaintiffs.

*Fullerton*, Q.C., for the defendants.

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[MEREDITH, C.J., ROSE, J., MACMAHON J., 7TH JANUARY, 1899.]

MAISONNEUVE v. TOWNSHIP OF ROXBOROUGH.

*Ditches and watercourses—Award—Engineer—Jurisdiction—Omissions—Declaration of ownership—Friendly meeting—57 V. c. 55, ss. 7, 8—Directory provisions—Waiver—Validating clause, s. 24.*

The landowner who initiated the proceedings under the Ditches and Watercourses Act, 57 V. c. 55, upon which the township engineer acted in making an award, had not filed a declaration of ownership pursuant to s. 7, although he was in fact the owner of the land mentioned in the notice as belonging to him, and had not caused a "friendly meeting" to be held pursuant to s. 8, before filing his requisition.

The plaintiff, whose lands were affected by the award, contended that the filing of the declaration and the holding of the meeting were acts essential to the jurisdiction of the engineer attaching.

*Held*, that the provisions of ss. 7 and 8 should be treated as directory only.

*Held*, also, following *Moore v. Gamgee*, 25 Q. B. D. 244, that the plaintiff's objections were such as could be waived, and had been waived by her appearing before the engineer and contesting the right of the initiating landowner to have the ditch made on her land and at her expense, without objecting to the engineer's jurisdiction.

*Held* also, that s. 24 of the Act applied so as to validate what was done by the engineer, in spite of the omissions.

*Aylesworth*, Q.C., for the plaintiff.

*Leitch*, Q.C., for the defendants.



## DORSEY v. DORSEY.

*Husband and wife—Separate estate of wife—Husband's interest in—Renunciation—Rights of administrator of wife's estate—Evidence of renunciation—Construction of document.*

An appeal by the plaintiffs from the decision of BOYD, C., 29 O. R. 475, 18 Occ. N. 261, was dismissed with costs.

ROSE, J., entirely agreed with the opinion expressed by the Chancellor.

MEREDITH, C.J., and MACMAHON, J., agreed in the result, and thought that if the writing was not sufficient in form, it should, on the uncontradicted evidence, be reformed so as to effectuate the intention of the parties.

*W. H. Irving*, for the plaintiffs.

*C. A. Ghent*, for the defendant.

## SMITH v. ROGERS.

*Company—Shares—Certificates—Indorsement—Transfer—Title—Innocent holder for value—Usage of Stock Exchange.*

An appeal by the Molsons Bank, one of the defendants, from the judgment of FALCONBRIDGE, J., in favour of the plaintiff. The action was brought to recover certain shares in the capital stock of incorporated companies pledged to the Molsons Bank for value, by indorsement upon the shares certificates, by the defendants Rogers & Hubbell, who were brokers, and obtained from the plaintiff, the owner of the shares, an indorsement in blank, and then received the advance made by the bank and applied it to their own use, or that of one of them. There was no transfer of the shares upon the books of the companies.

*Held*, that the proper conclusion upon the evidence was that, according to the usage of the Stock Exchanges in Ontario and Quebec and the course of dealing in or with shares such as those in question in this case, a share certificate, indorsed with a transfer and power of attorney signed by the person named in the certificate as the owner of the shares, having a blank left for the name of the transferee and attorney, passes from hand to hand, and is recognized and

treated as entitling the holder to deal with the shares as owner of them and to pass the property in them by delivery of the certificate so indorsed, or to fill in the blanks with his own name, and to cause the shares to be so registered upon the books of the company.

*Held*, upon the law, that the appellants, who received the certificates in question from the defendants Rogers and Hubbell in the ordinary course of business, for value, and without notice of the plaintiff's rights, had the right to retain them against her, although the dealing with the certificates of the defendants Rogers and Hubbell was, as between them and the plaintiff, an authorized dealing with and fraudulent appropriation to their own use of the plaintiff's property.

*Colonial Bank v. Cady*, 15 App. Cas. 267, followed.

Appeal allowed with costs, and action as against the Molsons Bank dismissed with costs.

*G. F. Henderson*, for the appellants.

*Aylesworth*, Q.C., for the plaintiff.

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*In re McLATCHIE—PRESTON v. LESLIE.*

*Executors and trustees—Forgery by one trustee—Liability of co-trustee.*

L., an executor and trustee, relying upon M., his co-executor and trustee, who was a solicitor, to obtain investments of estate moneys, having had it reported by M. that he had made a loan on satisfactory security to C. R., joined him in signing a cheque on the estate bank account, payable to the order of C. R. M. forged C. R.'s indorsement, obtained the money, and absconded.

*Held*, reversing the decision of the Master in Ordinary, that in taking the accounts of the estate L. should not be charged with the loss.

*G. G. S. Lindsey*, for the appellant, the defendant Leslie.

*Coatsworth*, for the plaintiff and defendants Hutcheson and Medlar.

*J. H. Moss*, for the defendants the Cockerams.

[14TH JANUARY, 1899.]

*In re* ROBERTSON AND CITY OF CHATHAM.

*Municipal corporations—Local improvements—Frontage system—Assessment—Benefit—Appeal—Court of Revision—County Court Judge—Prohibition—R. S. O. c. 223, ss. 664-685.*

The municipality in 1894 by by-law adopted the local improvement system as to the making of sewers, and also passed a general by-law for the purposes mentioned in s.-s. 1 of s. 612 of the Municipal Act then in force, 55 V. c. 42.

The appellant's lands fronting on a street along which the municipality proposed to make a sewer were, with the other lands so fronting, assessed at a uniform rate per foot frontage, for a portion of the cost of the sewer, and certain lands not fronting on the street, but which would derive benefit from the sewer, were assessed for the remainder of the cost.

The appellant appealed against his assessment to the Court of Revision, but his appeal was dismissed, and he then appealed to the County Court Judge, who found that the lands in question would be benefitted by the proposed sewer, but that the assessment was too high, and he reduced it, directing that the amount struck off should be assessed *pro rata* over the other properties included in the assessment.

*Held*, that he had no jurisdiction to do so; and prohibition awarded against the enforcement of his order.

Having regard to the provisions of the Municipal Act, R. S. O. c. 223, ss. 664-685, relating to local improvements, the method of assessment, in such a case as this, is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and assess the proportion appertaining to each class according to its frontage, and not according to the proportion of benefit received by each parcel or lot of land.

The County Court Judge could not inquire into the matters dealt with by s. 673 (6), as to lots being unfit for building purposes, because the municipal council had taken

no action under that sub-section; and if such action had been taken, it would not have been subject to appeal.

History and construction of the legislation.

*J. T. Small*, for the appellant.

*Aylesworth*, Q.C., for the municipality.

[ROSE, J., MACMAHON, J., 20TH JANUARY, 1899.]

### BOYD v. MORTIMER.

*Bills and notes—Assignee for creditors carrying on business—Personal liability of assignee on note—Signature as agent—Bills of Exchange Act, s. 26.*

Action on four promissory notes, commencing "four months after date we promise to pay," and signed "Mortimer & Co., P. Larmonth, assignee." Larmonth, who was assignee for creditors of Mortimer & Co., bookbinders, printers, and stationers, was carrying on the business under a trust deed for the benefit of the creditors, and under his own sole management. The notes were given for goods supplied by the plaintiffs after Larmonth began so to carry on the business. Before taking the notes the plaintiffs had refused to draw on Mortimer & Co., on the ground that Larmonth was the only person by whom a draft could be accepted. Larmonth had no authority under the trust deed to make notes or accept bills on behalf of Mortimer & Co.

*Held*, that, under these circumstances, and in view of s. 26 of the Bills of Exchange Act, Larmonth was personally liable on the notes.

*George Kerr*, for the plaintiffs.

*G. F. Henderson*, for the defendant Larmonth.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 25TH JANUARY, 1899.]

### HAGEN v. CANADIAN PACIFIC R. W. CO.

*County Court appeal—Divisional Court—Judgment of nonsuit—"Trial with a jury"—R.S.O. c. 55, s. 51, s.-s. (4).*

Where, at the trial of an action in a County or District Court, the Judge, at the conclusion of the plaintiff's evi-

dence, withdraws the case from the jury, and gives judgment dismissing the action, an appeal lies from such judgment to a Divisional Court of the High Court, for there has not been "a trial with a jury," within the meaning of s. 51, s. 51, of the County Courts Act, R. S. O. c. 55.

*Watson*, Q.C., for the plaintiff.

*D'Arcy Scott*, for the defendants.

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[MEREDITH, C.J., 7TH JANUARY, 1899.]

THOMSON v. CUSHING.

*Equitable execution — Interest in land — Writ of fi. fa. — Necessity for — Provisions of will — Effect as to creditor — Declaratory judgment.*

The testatrix bequeathed to her executors a sum of money in trust to be expended by them in the purchase of a farm for her nephew, to be conveyed to him subject to the express condition that it should not be sold, mortgaged, or affected in any way, but should be held and enjoyed by him as usufructuary during his life, and at his death should become the property of his children. In a subsequent paragraph of the will the testatrix directed that no part of her estate should be liable to seizure or attachment by any creditor of any legatee, "the same being made as and for the alimentary maintenance and support of my several legatees, and I therefore declare the same to be insaisissable."

The executors bought a farm for the nephew and had it conveyed to themselves. Subsequently they executed an instrument in which, after reciting the will and the purchase of the farm, they declared they stood seised of it upon the trust and for the purposes and subject to the provisions contained in the will.

In an action by a judgment creditor of the nephew to have the latter's interest in the land declared and sold to satisfy the judgment, or for a receiver to receive the rents and profits:—

*Held*, that the plaintiff could not reach the interest, if any, of his judgment debtor in the lands in question without

having a *fi. fa.* in the hands of the sheriff of the county in which the lands lay, at the time of the commencement of the action.

*Held*, also, that if the directions of the will were effectual to prevent the lands being made liable to creditors, the judgment debtor had no interest in the land which could be made available by legal process for satisfaction of the judgment; and if they were not effectual, there was nothing in the way of ordinary process; and in either case the action was not sustainable.

*Held*, also, that the plaintiff had no *locus standi* to claim a declaration as to the right of the judgment debtor in the lands.

*Bunnell v. Gordon*, 20 O. R. 281, followed.

*E. D. Armour*, Q.C., and *H. J. Martin*, for the plaintiff.

*A. W. Briggs*, for the defendant *E. Sawtell*.

*A. J. Boyd*, for the infant defendants.

*J. H. Macdonald*, Q.C., for the other defendants.

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### STRUTHERS v. TOWN OF SUDBURY.

*Assessment and taxes—Exemptions—R. S. O. c. 224, s. 7, s.-s. 5—Public hospital.*

The Sudbury General Hospital was the property of private individuals, and the profits derived from carrying it on belonged to them; it had not a perpetual foundation; no part of its income was derived from charity; it was not managed by a public body; but one object of it was the benefit of a large class of persons; and the Ontario Legislature had placed it in the list of institutions named in schedule A. to the Charity Aid Act, R. S. O. 1887 c. 248, and declared it to be entitled to aid under the provisions of that Act, subjecting its by-laws to the control of the Executive Government and the hospital itself to Government inspection.

*Held*, that it was entitled to exemption from municipal taxation as being a "public hospital" within the meaning of s.-s. of s. 7 of the Assessment Act, R. S. O. c. 224.

*Blake v. Mayor, etc., of London*, 18 Q. B. D. 437; 19 Q. B. D. 79, distinguished.

Aylesworth, Q.C., for the plaintiffs.

W. R. White, Q.C., for the defendants.

[FERGUSON, J., 14TH DECEMBER, 1898.]

TEW v. TORONTO SAVINGS AND LOAN COMPANY.

*Landlord and tenant—Assignment for benefit of creditors—Future rent—  
Preferential lien—Accelerating clause—R. S. O. c. 170, s. 34.*

A lease under which the rent was payable quarterly in advance contained a provision that if the lessee should make an assignment for the benefit of creditors, the then current and next ensuing quarters' rent and the current year's taxes, etc., should immediately become due and payable as rent in arrear, and recoverable as such.

*Held*, on the lessee making such an assignment, that the lessor was entitled to recover—in addition to a quarter's rent due and in arrear for the quarter preceding the making of the assignment—the current quarter's rent, being the quarter during which the assignment was made, which was also due and in arrear, as well as a further quarter's rent, together with the taxes for the current year.

R. S. O. c. 170, s. 34; *Langley v. Meir*, 25 A. R. 372, 18 Occ. N. 27; and *Lazier v. Henderson*, 29 O. R. 673, 18 Occ. N. 358, considered.

C. D. Scott, for the plaintiff.

D. W. Dumble, for the defendants.

[ROSE, J., 28TH JANUARY, 1899.]

CREPEAU v. PACAUD.

*Costs—Apportionment of—Several issues—Divided success.*

In an action on a foreign judgment, the defences were that the defendant was never served with the process of the foreign tribunal; that he never submitted to the foreign

jurisdiction, to which he was not subject; and that the plaintiff's claim was barred by the Statute of Limitations. The plaintiff, in reply to the last defence, set up a written acknowledgment. Judgment was given for the defendant upon the last defence, it being held that the acknowledgment was not sufficient to take the case out of the statute; but the other defences were not sustained in evidence, and the judgment pronounced was that the defendant should have the general costs of the action, and the plaintiff the costs of the issues upon which the defendant failed.

The defendant moved before the trial Judge to vary the disposition of costs.

*J. H. Moss*, for the defendant, cited *Lockhard v. Waugh*, 17 P. R. 269, and *Jenkins v. Jackson*, [1891] 1 Ch. 89.

*F. A. Anglin*, for the plaintiff, referred to *Blank v. Footman*, 39 Ch. D. 678; *Reinhardt v. Mentasti*, 42 Ch. D. 690; *Barnes v. Warmesley*, 47 L. J. Ch. 473; *Neale v. Windsor*, 9 Gr. 261; Rules 1149, 1154, 1176.

ROSE, J., refused the motion.

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[STREET, J., 3RD DECEMBER, 1898.]

*In re* TOWN OF CORNWALL AND CORNWALL WATER-  
WORKS CO.

*Municipal corporations—Arbitration and award—Payment of amount of award into Court—Waterworks company—Mortgages—Bondholders.*

Sections 445 and 446 of the Municipal Act, R. S. O. c. 223, which authorize the payment of money awarded, with interest and costs, into Court, apply to awards made under the Gas and Water Companies Act, R. S. O. c. 199; and where the amount paid in was less than the amount properly payable in, the town corporation, who had paid the money in, were allowed to amend their order for payment in and to pay in the proper amount, but such payment was only to date from the obtaining of the amended order.

It is no objection to such payment in that a controversy exists between the parties to the arbitration as to their respective rights thereunder; but mortgagees and bondholders,



*who* had not been made parties to the arbitration, were not to be affected thereby.

The fact of the vice-president of a loan company, who were mortgagees in trust for the bondholders, signing a draft upon and writing a letter to the waterworks company to enable the loan company to obtain the amount of the award and interest which had been paid into a bank by the town corporation, to the joint credit of the waterworks company and the mortgagees, but the writing of such letter was never authorized by the bondholders, and was outside the powers conferred by the mortgage, and was repudiated by the bondholders, was held not to constitute a waiver of the rights of the bondholders and mortgagees.

*Bruce*, Q.C., for the mortgagees and bondholders.

*Aylesworth*, Q.C., for the waterworks company.

*E. D. Armour*, Q.C., for the town corporation.

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### IN CHAMBERS.

[MEREDITH, C.J., 10TH JANUARY, 1899.]

### THOMPSON v. PEARSON.

*Costs—Scale of—Ascertainment of amount—County Courts Act, R. S. O. c. 55, s. 23 (2)—Contract.*

The defendant employed the plaintiffs as his brokers to sell on his account 200 shares of a certain stock at a named price, the plaintiffs undertaking that in the event of loss the defendant's liability should not exceed \$200. The contract involved the making by the plaintiffs of a contract for the future delivery of the shares at the price named, and their acquiring the stock when it became necessary, by the rules of the Exchange, to complete the transaction. In an action upon this contract the plaintiffs recovered \$200.

*Held*, that the amount of their claim, as found by the judgment, was not liquidated or ascertained by the act of the parties, within the meaning of s. 23 (2) of the County Courts Act, R. S. O. c. 55; and the plaintiffs were entitled to costs on the scale of the High Court, although the amount

recovered did not exceed \$200, the trial Judge having certified for costs on the High Court scale in the event of the amount recovered being found to be unascertained.

*R. McKay*, for the plaintiffs.

*J. H. Denton*, for the defendant.

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[11TH JANUARY, 1899.]

### HARRIS v. TORONTO ELECTRIC LIGHT CO.

*Discovery—Examination of officer of company—Duty to obtain information from servants—Privilege.*

Upon the examination for discovery of an officer of an incorporated company, in an action brought against the company by a person whose building they supplied with electrical power, to recover damages for injury by fire which he alleged to have been caused by their negligence, the deponent, being asked whether on the date of the fire there was any indication at the power house or the defendants' works that there was any trouble or breakage in the wires on the circuit by which power was supplied to the plaintiff, answered that there were such indications.

*Held*, that he was bound to answer the further question as to what the indications were, if he had knowledge of the facts; and if he had not such knowledge, but could obtain it from a servant of the defendants who acquired the knowledge in the course of his employment, he was bound to obtain it so as to enable him to answer the question; and even if the information which the deponent had was obtained for the purpose of enabling counsel to advise, and he could claim privilege for it, he was bound, nevertheless, to obtain the information anew for the purpose of discovery.

*Bolckow v. Fisher*, 10 Q. B. D. 161, and *Southwark Water Co. v. Quick*, 3 Q. B. D. at p. 321, followed.

*J. B. Clarke*, Q.C., for the plaintiff.

*H. O'Brien*, for the defendants.

[18TH JANUARY, 1899.]

## ACCOUNTANT OF THE SUPREME COURT OF JUDICATURE v. MARCON.

*Chattel mortgage—Erroneous description of dwelling-house—Falsa demonstratio.*

The goods intended to be included in a chattel mortgage were described in the body thereof as the goods and chattels mentioned in the schedule, all of which now are the property of the mortgagors, and are situated upon the premises on the north-east corner of Queen street and Birch avenue, in the township of York. Indorsed on the mortgage was a schedule containing a list of the goods, which consisted of household furniture, each article being described, and the articles in each room set out under a heading describing the room according to the purpose for which it was used. The mortgage contained a covenant on the part of the mortgagors that if they should do any of certain acts, one of which was the parting with the possession of the goods, the mortgagee was to be entitled to take possession. One of the mortgagors was described as an "esquire."

*Held*, that, having regard to these provisions, it was to be taken that the mortgaged goods were the property of the mortgagors; that they were in their possession, and were contained in the building described in the mortgage; that that building was the dwelling-house of the mortgagors; and that the goods were the household furniture in use by the mortgagors.

*Hovey v. Whiting*, 14 S. C. R. at p. 559, referred to.

And, although, when the mortgage was executed, the goods actually were in the house at the north-west corner of Queen Street and Birch Avenue, and not that at the north-east corner, the mortgage was not void; the erroneous part of the description might be rejected, and the statement that they were contained in the mortgagors' dwelling-house would remain.

*Coatsworth*, for the execution creditor.

*H. T. Beck*, for the claimant.

## NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 12TH DECEMBER, 1898.]

*In re* JEWETT.*Arbitration and award—Arbitrators' fees—Basis of assessment.*

A man who chooses to act as an arbitrator cannot fix his fees upon the basis of value of his services in his own special business for the time given to the arbitration. He need not act as an arbitrator unless he chooses, or he may stipulate as a condition to his consenting to act that his remuneration shall be at a fixed rate, but in the absence of that, if he chooses to act as an arbitrator, he must be contented with arbitrator's pay. What that pay is must obviously depend upon the particular circumstances of each case. The expert, the professional man, the lawyer, surgeon, or engineer, as the case may be, who has been selected as arbitrator because the matters in controversy were such as his special training and education enabled him the more intelligently to determine, can scarcely expect to be rated the same as one who has no such exceptional qualification for the work on hand. It is obvious also that in determining as to the reasonableness of the compensation, regard must be had to the nature and importance of the right in dispute, the amount of money involved, and the time necessarily occupied in the work.

Where each of three arbitrators, in a case of no real difficulty, for the determination of the value of land sought to be expropriated, charged for his services on hearing evidence \$25 per day of four and a half hours, the Judge on review reduced the charge to \$20 per day of six hours.

*C. N. Skinner*, for the appellants.

*A. I. Trueman*, for the arbitrators.

[20TH DECEMBER, 1898.]

## LEONARD v. LEONARD.

*Will—Construction—Absolute devise—Words of defeasance.*

A testator by his will devised a piece of land with house thereon to his wife absolutely to enable her to maintain a home for herself and his two sons until they should respectively attain the age of twenty-one years. The residue of his estate he devised and bequeathed to his executors in trust for his two sons. The will then provided as follows: "The devise and bequest to my said wife shall be in full satisfaction and in lieu of all dower, and should she marry again, the property in such event so devised to her as herein stated shall vest in my said executors and trustees for the benefit of my said sons as hereinafter expressed."

*Held*, that the wife took an absolute interest subject to be divested in the event of her marriage.

W. W. Allen, for the widow.

A. I. Trueman, for the children.

A. H. Hanington, Q.C., for the executors.

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MURCHIE v. THERIAULT.*Registry laws—Copy of instrument—Proof of signature of grantor.*

A copy of a marriage contract entered into in the Province of Quebec before a notary public of Quebec, by which the intending husband endowed his future wife in a sum of money charged upon his real estate, was registered in the office of the registrar of deeds for Madawaska county, N.B. The copy was certified by the notary to be a true copy of the original on file in his office. The signature of the husband was not proved or acknowledged. Subsequently to its registration, the husband charged his real estate in Madawaska county with a mortgage to the plaintiff, who acted in good faith and without notice of the previous incumbrance.

*Held*, that under the registry laws of New Brunswick a copy of the contract could not be admitted to register and that the registration was also defective owing to absence of proof of the husband's signature.

*W. Pugsley, Q.C., and J. G. Stevens, for the plaintiff.*  
*A. A. Stockton, Q.C., and La Forest, for the defendant.*

### POIRIER v. BLANCHARD.

*Contempt of Court—Disobedience of injunction order—Procedure.*

Upon breach of an injunction order, an order should not be taken out calling upon the party in contempt to show cause why an attachment should not issue against him, but the motion ought to be that he stand committed on notice of the motion having previously been personally served upon him. Where the injunction is to do a thing, the course is to move for an order that the party shall do it on a particular day, or stand committed.

*G. G. Gilbert, Q.C., for the plaintiff.*  
*J. R. Campbell, for the defendant.*

### In the St. John County Court.

#### IN CHAMBERS.

[FORBES, C.J., 20TH DECEMBER, 1900.]

### JENKINS v. ARNOLD-FORTESCUE.

*Arrest. Affidavit to hold to bail—Claim for interest on bill of exchange—Liquidated damages.*

The defendant was arrested in an action to recover the principal and interest, from date of maturity, of a bill of exchange. The affidavit to hold to bail contained a count equivalent to the common count for interest.

Application was made on behalf of the defendant to have the arrest set aside, because the affidavit to hold to bail did not state that there was an express agreement to pay interest.

The plaintiff's counsel contended that s. 57 of the Bills of Exchange Act of 1890 made interest for non-payment of a bill at maturity, from the time of such non-payment, liquidated damages.

*Held*, that under the Bills of Exchange Act the interest therein allowed is liquidated damages; that those liable to pay the same can be arrested; and therefore an affidavit to hold to bail need not set forth an express agreement to pay interest.

Order refused.

*J. K. Kelley*, for the defendant.

*D. Mullin*, for the plaintiff.

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## MANITOBA.

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### In the Queen's Bench.

[FULL COURT, 23RD DECEMBER, 1898.]

REGINA v. PIKE.

*Criminal law—Forcible entry—Intention to take possession an essential element.*

Crown case reserved. The prisoner was indicted on the charge of having unlawfully entered a house then in the possession of one Phillips, in a manner likely to cause a breach of the peace. The evidence showed that the prisoner opened a door of the house, which was then unlocked, and went in, accompanied by four men, acting under his directions. There were then in the house, in the possession of Phillips, various articles of furniture and chattels, not being fixtures, and forming no part of the realty or leasehold interest of Phillips, which articles and chattels the prisoner *bona fide* claimed and believed to be his absolute property, and to the possession of which he believed himself entitled. He and the men went to the house solely with the

intent of removing the articles, and not with any intent to take possession of the house or land or any part thereof. The act of ousting Phillips therefrom, or of interfering with his possession or occupation, save so far as was necessary for the removal of the articles, and neither the prisoner nor the men attempted to take possession of the house, and they did not interfere with the possession of the house by the prisoner, save by the taking possession of the articles and the acts as were actually necessary to their removal.

The prisoner was tried before KILLAM, J., who held that the entry did not constitute a forcible entry within the meaning of s. 89 of the Criminal Code, or under any other provision of force in Manitoba, and that there was no evidence warranting a conviction. The prisoner was therefore acquitted, but, KILLAM, J., reserved for the opinion of the full court the question whether there was any evidence warranting a conviction.

*Held*, that the question should be answered in the affirmative.

It is clear that the intention to take possession of the land and tenements entered upon is an essential element of a forcible entry; the evidence showed that it was not with such intention that Pike made the entry he was charged with. He did not do anything for which he could be held to be criminally responsible, and he was properly acquitted.

*Ashbaugh*, for the private prosecutor.

No one appeared for the accused.

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### RITZ v. FROESE.

*Jurisdiction—Sale of land under judgment in County Court—Verdict made by Queen's Bench.*

This action was brought to obtain possession of the land. The plaintiffs alleged title under an order of the County Court in March, 1896, for sale of the land to satisfy a judgment recovered in a County Court by one Russell against the defendant. This order provided that the land or the interest of the defendant and Froese be sold. After alleging further pro-



and a sale and purchase by the present plaintiffs, the statement of claim alleged an order vesting the land in them for all the estate, right, title, and interest of Russell, Schmidt, Froese, and Peters. The defendant demurred to the statement of claim on the ground of want of jurisdiction in this Court to make these orders; of the want of a sufficient allegation of notice to the present defendant of the application for the orders; and other defects.

The demurrer was overruled by TAYLOR, C.J., and the defendant appealed.

The only question argued on the appeal was that of jurisdiction.

*Held*, that every thing is to be intended in favour of the jurisdiction of a Superior Court: *Mayor of London v. Cox*, L. R. 2 H. L. 239.

The original order was not termed a judgment, and it did not use the word "adjudged." It was stated to have been made in the matter of a judgment recovered in a County Court. For all that, the order might have been made in a cause in this Court, and it might have been made after judgment in that action, if that were absolutely necessary to support it. No inference could be drawn from its unusual form. It should not be inferred that any of the orders alleged were made without jurisdiction. Having been made by a Court of competent jurisdiction, the defendant affected by the original order could not ignore it as an order absolutely void, but should have taken steps to have it set aside: *In re Padstow Association*, 20 Ch. D. 137.

*Tupper*, Q.C., and *Phippen*, for the plaintiff.

*Ewart*, Q.C., for the defendant.

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#### BRAND v. GREEN.

*Foreign company—Dissolution of, under order of foreign Court—Actions against company—Staying proceedings in.*

Persons residing in the State of Massachusetts brought two actions in the Court of Queen's Bench for Manitoba against an incorporated company having its existence under the laws of and domiciled in the State of New York,

upon a contract made out of Manitoba and which be performed out of it, that is, upon a cause of action wholly outside the Province. After commencing actions, the plaintiffs obtained, in each case, an attaching money order alleged to be owing by a person in Manitoba to the defendant company to answer to the amount to be recovered in the action, and served the same upon the garnishee.

Before the actions were commenced, a person made application to the proper Court in New York to wind up the company, and obtained an order appointing a receiver of the assets of the company, and restraining the company and its officers from exercising its franchise, from collecting its assets, and its creditors from bringing actions against it. Subsequently, but after the actions had been brought in this Province and after the attaching orders had been served, the New York Court made a judgment decree dissolving the company and appointing a permanent receiver of its assets.

Then the company and the receiver obtained from the Referee in Chambers orders staying proceedings in the actions and setting aside the attaching orders. Upon appeal these orders of the Referee were affirmed, and the case is now appealed.

*Held*, that, if the company was absolutely defunct, that the actions could not be carried to judgment. It was difficult to see how it could make any application, as the receiver had no *locus standi* to be heard on that point. Proceedings in bankruptcy or insolvency are not necessarily a bar to an action against the bankrupt or insolvent. Under the Insolvent Acts they constituted no bar until the discharge of the insolvent, which had to be pleaded. The Supreme Court of the United States has held that a discharge under the insolvency laws of one State is not a bar to an action by a resident of another State who voluntarily made himself a party to the insolvency proceedings: *Baldwin v. Hale*, 1 Wall. 123; *Brown v. Smith*, 10 U. S. R. 454. But if the proceedings in New York were a bar to an action here, or a ground for an injunction against the suit of the company to restrain an action here, they

be pleaded. As to the garnishee orders, the question of their validity as against the receiver or other creditors should be determined in some more formal proceeding than a Chambers application to set them aside.

The appeals should be allowed, and the orders in Chambers discharged, with costs of the application therefor and of both appeals.

*Perdue*, for the plaintiffs.

*Haggart*, Q.C., for the defendants.

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### REGINA v. HAMILTON.

*Criminal law—Depositions of deceased witness—Admissibility of, at trial—Verification.*

Crown case reserved. The prisoner was charged with procuring an abortion on the person of M. L. Walker, since deceased; the question raised was whether two sets of depositions allowed to be read as evidence at the trial were properly authenticated and proved so as to be admissible in evidence.

A paper, exhibit 2, was alleged to contain the evidence taken upon the charge on which the prisoner was convicted. It bore the heading, "Canada, Province of Manitoba, Western Judicial District," and then began: "The depositions of Martha Louisa Walker and —— of ——, taken on," etc., "at Brandon, in the Western Judicial District, before the undersigned, one of Her Majesty's Justices of the Peace for the said Province, in the presence and hearing of A. Hamilton, who stands charged," etc. After her statement there were two signatures, "K. Campbell" and "Louisa Walker."

*Held*, admissible. The words "Louisa Walker" at the end should be construed as the signature of Martha Louisa Walker, the witness, and the other signature as that of the person referred to at the beginning as the undersigned. The document purported to be signed by the justice before whom the deposition purported to have been taken.

The other document, exhibit 1, had the same as exhibit 2, and then began: "The depositions of Hamilton of Municipality of Rossburn," and "———, taken on this 25th day of March," etc., "don," etc. (proceeding as in the other, exhibit 2, setting out a charge of a different offence).

After what appeared to be Matthew Hamilton's deposition, with the signatures "K. Campbell" and "M. Hamilton," the document proceeded: "Florentine E. ——— sworn, saith," followed by what appeared to be her deposition, and the signatures "K. Campbell" and "Florentine Hamilton." Then there was a note as to certain evidence produced, taken being read by consent, followed by the statement:

Prisoner is remanded until Tuesday March 29th, at 10 o'clock, with the date, "March 25th, 1898," and the signature "K. Campbell."

Up to this point three sheets of paper were used, and were annexed twenty-two other sheets written on. The first of these written sheets began "Martha Louisa Walker sworn, saith," which was followed by what appeared to be her deposition, occupying eighteen sheets of paper, and ending on the 18th "K. Campbell, P.M." and "Louisa Walker." L. Walker was recalled, and there was further evidence produced, occupying two sheets, with signatures as before.

*Held, inadmissible.* The twenty sheets, taken by themselves, or through any apparent connection with witnesses who preceded or follows them, do not purport to contain depositions taken before a justice of the peace, or to be signed by a justice of the peace. The heading or caption on the first page of the whole document purported to refer only to depositions taken on 25th March. On the third sheet there was the order of remand, and the natural construction of the document as a whole, having reference both to the order in which the sheets were arranged and to the numbers upon them, was that the evidence upon the first three sheets was given on 25th March. Under the circumstances, it did not seem that the fastening of the sheets together could give a purport to the fourth, and following sheets contained depositions taken before the same or another justice, or connect the sig-

on pages 21 and 25 with the introductory matter on the first page, as in the case of exhibit 2.

Conviction quashed and a new trial granted.

*Perdue*, for the Crown.

*Howell*, Q.C., for the prisoner.

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[BAIN, J., 80TH DECEMBER, 1898.]

BENTLEY v. BENTLEY.

*Specific performance—Trust—Executory contract—Covenant in restraint of trade—Injunction—Vagueness—Want of limitation as to space.*

The plaintiff carried on the business, under the name of the Berlin Photograph Company, of making enlarged portraits in crayon from photographs. On the 1st July, 1897, under a written contract, the defendant agreed to become the agent of the plaintiff, for the term specified, to take orders for portrait work. Early in June, 1898, differences arose between the plaintiff and defendant, but the defendant and his men acting under him, using the sample portraits of the plaintiff, continued to canvass and take orders until the 20th June. The defendant admitted he had not handed over to the plaintiff a number of orders taken under the terms of the contract, amounting to about \$3,000. On the 20th June the defendant notified the plaintiff's solicitor that he had decided to rescind the contract.

*Held*, that the plaintiff was entitled to an order of the Court for the delivery of these orders. In decreeing the specific delivery of the orders and original photographs accompanying them, to the plaintiff, the Court would be rather enforcing the performance of an express trust than ordering specific performance of an executory contract. Where a fiduciary relationship exists between parties in regard to personal chattels, then, irrespective of the nature and value of the chattels, the jurisdiction of the Court can always be invoked for the protection of the *cestui que trust*: *Pooley v. Budd*, 14 Beav. 34; *Carter v. Long*, 26 S. C. R. 480.

Since the 20th June the defendant had himself begun a business of the same kind as the plaintiff's, under the name

of the Bentley Portrait Company, and he and an agent had been canvassing for orders.

The plaintiff asked for an injunction to restrain the defendant and his agents from taking orders for portraits or other goods, except in accordance with the terms of the contract with the plaintiff.

The contract contained the affirmative covenant of the defendant, that he would "act as such agent of the plaintiff aforesaid and in accordance with the terms of this contract," and also a negative one "that he will sell no other than portraits and frames between the 1st April and 31st December in each year, without first obtaining the consent thereto of the party of the first part." And there was a further covenant that neither he nor his agent would "do anything in the picture or frame line other than those specified in this agreement during the currency thereof, without obtaining the permission of the party of the first part to do so."

*Held*, that the affirmative agreement of the defendant was one that the Court would not undertake to enforce specifically; and as the parties had themselves settled the matter set out in the contract what the defendant was not to do would not be permissible to imply further negative covenants from the affirmative one.

One reason why the Court should not enforce the covenant by injunction was that it was so vague and uncertain that it would be a difficult matter to form a definite conclusion as to its meaning. When an injunction is granted it is usually expressed in the words of the contract itself. Here the word "handle" was evidently used in some secondary sense, and an injunction in the exact terms of the covenant would be senseless. It was, moreover, a covenant that was wholly unlimited as to space; and, as, under the contract, the defendant was to be actively engaged as the plaintiff's agent for only six months in each year, the injunction imposed on him an unreasonable restraint, and the Court should not lend its assistance to enforce it.

*Culver*, Q.C., and *Taylor*, for the plaintiff.

*Munson*, Q.C., for the defendant.

## Supreme Court of Canada.

EICHQUEER COURT.]

[21st NOVEMBER, 1898.

## REGINA v. WOODBURN.

*Contract—Public work—Powers of Queen's printer—Ratification—Breach—Appeal.*

On the 22nd November, 1879, the Government of Canada entered into a contract with C. by which the latter undertook to do all the Government binding for five years from that date. The contract was executed under the authority of 32 & 33 V. c. 7, s. 6, and on the 25th November, 1879, was assigned to W., who performed all the work sent to him up to the 5th December, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's printer as follows: "I am directed by the Honourable the Secretary of State to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution under the same rates and conditions, as under the contract which has just expired." W. performed the work for two years under authority of this letter, and then brought an action for the profits he would have had on work given to other persons during the seven years.

*Held*, that the letter of the Queen's printer did not constitute a contract binding on the Crown; that the statute authorizing such contract was not directory, but limited the power of the Queen's printer to make a contract except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's printer; and that he could not recover in respect of the work done after the original contract had expired.

On the 30th October, 1886, an order in council was passed which recited the execution and assignment of the original contract, the execution of the work by W. after it expired,

and the recommendation of the Secretary of State that a formal contract should be entered into extending the order to the 1st December, 1887, and then authorized the Secretary of State to enter into such formal contract with W., but subject to the condition that the Government should waive all claims for damages by reason of non-execution or impeded execution of the work, and that W. should waive all claims to damages because of the execution of binding work by other persons up to the date of the extension. W. refused to accept the extension on such terms.

*Held*, that W. could not rely on the order in court as a ratification of the contract formed by the letter of the Queen's printer; that the element of *consensus* entered so much into a ratification of a contract as into the contract itself; and W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it.

Judgment of the Court below, 6 Ex. C. R. 12, 18 N. 77, reversed.

After an appeal from the final judgment of the Exchequer Court was lodged in the Supreme Court, the appellant obtained leave to appeal from an order directing a reference to ascertain the amount of the suppliant's damages.

*Held*, that the Judge of the Exchequer Court had authority to allow the appeal, and it was properly before the Supreme Court.

*Newcombe*, Q.C., for the appellant.

*Hogg*, Q.C., and *R. V. Sinclair*, for the respondent.

ONTARIO.]

### BARBER v. McCUAIG.

*Mortgage—Sale of equity of redemption—Covenant of indemnity—Assignment of, to mortgagee—Principal and surety—Subsequent dealings with purchaser—Release—Right of action.*

C. executed a mortgage on his lands in favour of B. with the usual covenant for payment. He afterwards sold the equity of redemption to D., who covenanted to pay the mortgage and indemnify C. against all costs and da-



in connection therewith. This covenant of D. was assigned to the mortgagee. D. then sold the lands, subject to the mortgage, in three parcels, each of the purchasers assuming payment of his proportion of the mortgage debt, and he assigned the three respective covenants to the mortgagee, who agreed not to make any claim for the mortgage money against D. until he had exhausted his remedies against the three purchasers and against the lands. The mortgagee having brought an action against C. on his covenant in the mortgage:—

*Held*, reversing the judgment of the Court of Appeal, 24 A. R. 492, 17 Occ. N. 280, that the mortgagee, being the sole owner of the covenant of D. with the mortgagor assigned to him as collateral security, had so dealt with it as to divest herself of the power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage.

*Aylesworth*, Q.C., for the appellant.

*W. H. Irving*, for the respondent.

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**QUEBEC.]**

**EASTERN TOWNSHIPS BANK v. SWAN.**

*Appeal—Question of practice—Hearing—Peremptory order—Notice.*

Where a grave injustice has been inflicted upon a party to a suit, the Supreme Court of Canada will interfere for the purpose of granting appropriate relief, although the question involved upon the appeal may be one of local practice only.

*Lambe v. Armstrong*, 27 S. C. R. 390, followed.

Under a local practice prevailing in the Superior Court in the District of Montreal, the plaintiff obtained an order from a Judge fixing a day peremptorily for the adducing of evidence and hearing on the merits of a case, by precedence over other cases previously inscribed on the roll, and with-



on the 30th July K. was notified that the repairs were completed, and the tug would be put out of dock the following day, and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, and that she was not in as good condition as when leased; and he requested the company to join in a survey, which, however, they declined to do. The survey was made by a naval architect, who reported that, in addition to the repairs already made, it would cost \$2,494.90 to restore the vessel to the same condition as when leased to the company. On the 1st August K. took possession of the tug under protest, and brought the action for the amount of this estimate, in addition to the rent accrued, with fees for survey and protest. The company admitted the rent due, and tendered that portion of the claim and paid it into Court. The Superior Court rendered judgment for the amount of the tender, dismissing the action as to the remainder of the claim, on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The Courts of Review and Queen's Bench increased the verdict to the full sum claimed, \$4,909.90, by adding the amount of the surveyor's estimate and the fees.

On appeal to the Supreme Court of Canada:—

*Held*, affirming these judgments, that the contract between the parties was a contract of lease; that the taking of the vessel, in the daytime, into the waters where she struck was *prima facie* evidence of negligence on the part of the company; and that, as the company did not adduce evidence sufficient to rebut the presumption of fault existing against them, they were responsible, under the Civil Code of Lower Canada, for the damages caused to the vessel during the time it was controlled and used by them.

*Held*, further, that the proper estimate of damages, under the circumstances, was the cost of the repairs, which should be assumed to be the measure of depreciation in value occasioned by the accident, and that no substantial error arose from regarding the condition and value of the vessel at the commencement of the lease as that in which she ought to have been discharged.

GIROUARD, J., dissented from the majority of the court and was of opinion that the Superior Court judgment should be restored.

*Fitzpatrick, Q.C., S.-G., and Walkem, Q.C., for the appellants.*

*Languedoc, Q.C., and Stuart, Q.C., for the respondents.*

### ROBERTS v. HAWKINS.

*Negligence—Trespasser—Dangerous way—Warning—Imprudence.*

A cow-boy aboard a ship, on the eve of departure from the port of Montreal, was injured by the falling of a hatch cover then in use, which had been insecurely fastened. The boy was not at the time engaged in the performance of any duty, although he had been warned to "stand from under." He had not moved away from the dangerous position he was occupying.

*Held*, reversing the decisions of both Courts below, that the boy's imprudence was not merely contributory negligence but constituted the principal and immediate cause of the accident, and that, under the circumstances, neither the ship nor the owners of the ship could be held responsible for damages on account of the injuries he received.

*MacMaster, Q.C., and Peers Davidson, for the appellants; Geoffrion, Q.C., and J. M. Ferguson, for the respondents.*

NEW BRUNSWICK.]

[21st NOVEMBER 1901.]

### EMPLOYERS' LIABILITY ASSURANCE CORPORATION v. TAYLOR.

*Accident insurance—Condition in policy—Notice—Condition precedent.*

A policy of insurance against accidents contained the following condition: "In the event of any accident with the meaning of this policy happening to the insured, notice containing full name and address of the insured, and full particulars of the accident, shall be given within

days of its occurrence to the manager for the United States at Boston, Mass., or the agent of the corporation whose name is indorsed hereon."

The insured having died from an accident, his widow, as beneficiary, brought an action on the policy, to which the company pleaded want of notice under the above condition. The plaintiff demurred to this plea, and her demurrer was allowed by the Supreme Court of New Brunswick.

On appeal to the Supreme Court of Canada:—

*Held*, reversing the judgment appealed from, GWYNNE, J., dissenting, that the giving of the notice was a condition precedent to a right of action on the policy, and that the demurrer to the plea must be overruled.

*Owen Ritchie*, for the appellant.

*Pugsley*, Q.C., and *Blair*, for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

DIVISIONAL COURT.]

[24TH JANUARY, 1899.

O'CONNOR v. GEMMILL.

*Solicitor—Agreement for compensation—Champerty—Exchequer Court—Taxation.*

An agreement by a solicitor to prosecute a claim to judgment at his own expense, in consideration of his receiving one-fourth of the amount which should be recovered, is champertous and void.

A solicitor of the Supreme Court of Judicature for Ontario who carries on proceedings for a client in the Exchequer Court of Canada is subject to the provisions of the Solicitors Act, and may be compelled to deliver a bill of costs for taxation.

Judgment of a Divisional Court, 29 O. R. 47, 18  
12, reversed in part; OSLER, J.A., dissenting.

*F. A. Anglin*, for the appellant.

*Arnoldi*, Q.C., for the respondents.

## CASTON v. CONSOLIDATED PLATE GLASS COM

*Master and servant—Hiring waggon—Negligence of driver—New  
Adding parties.*

When a man is the general servant of one person, at the same time the servant of another person in relation to a particular matter, the question of which of these two persons is liable for his negligence must be decided by ascertaining which of them was exercising control over him at the time of the negligent act or omission, and if, in an action for damages against the alleged master, there is evidence of exercise of control the case must go to the jury.

In this case, where the defendants had hired from another company a horse and waggon and driver at a fixed rate per day, it was held by the majority of the Court that there was some evidence from which exercise of control might be inferred.

Judgment of a Divisional Court affirmed, BURTON, J., and MACLENNAN, J.A., dissenting.

A Divisional Court in ordering a new trial in an action for damages against the alleged master, on the plaintiff's application, may properly add as a party defendant a person against whom relief is then for the first time claimed as an alternative.

Judgment of a Divisional Court affirmed.

*Ritchie*, Q.C., for the appellants the Consolidated Plate Glass Company.

*Shepley*, Q.C., for the appellants the Cobban Manufacturing Company.

*J. W. McCullough* and *A. F. Lobb*, for the respondents.

## ELGIE v. BUTT.

*Arrest—Foreigner—Temporary sojourn in Ontario.*

A foreigner who contracts a debt in the country of his domicile, and then comes to this Province to stay temporarily, cannot be arrested here in respect of that debt, when in good faith about to leave this Province to return home.

Judgment of a Divisional Court reversed.

*W. M. Douglas*, for the appellant.

*Garrow*, Q.C., for the respondent.

## LEIZERT v. TOWNSHIP OF MATILDA.

*Municipal corporations—Highway—Non-repair—Accident on boundary road  
—Notice of accident to both municipalities—Joint action.*

The notice in writing of the accident and the cause thereof, referred to in the Consolidated Municipal Act, 1892, s. 531, s.-s. 1, as amended by 57 V. c. 50, s. 13, and 59 V. c. 51, s. 20, is not necessary when the accident is the result of non-repair of a highway which two or more municipalities are jointly liable to keep in repair.

Judgment of a Divisional Court, 29 O. R. 98, 18 Occ. N. 6, affirmed; *MACLENNAN*, J.A., dissenting.

*Adam Johnston*, for the appellants.

*Irvin Hilliard*, for the respondent.

## FOLEY v. TOWNSHIP OF EAST FLAMBOROUGH.

*Municipal corporations—Highway—Want of repair—Negligence of driver  
—Damages—Contributory negligence.*

A highway, in a thickly settled district, over which there is much traffic, is out of repair, within the meaning of the statute, when a large stump is allowed to stand in the highway just at the edge of the travelled way.

Where horses are running away because of no fault of the driver, and while he is still endeavouring to recover control of them he sustains injury owing to such a defect in the highway, he is entitled to damages.

The contributory negligence of the driver of the vehicle in such a case is not an answer to an action for injuries sustained by an occupant thereof, who has in good faith intrusted himself to the driver's care.

Judgment of a Divisional Court, 29 O. R. 139, 18 Occ. N. 60, reversed.

*Lynch-Staunton*, for the appellants.

*W. T. Evans*, for the respondents.

[3RD FEBRUARY, 1911.]

### DOUGLAS v. STEPHENSON.

*Libel—Public official—Newspaper—Comments in, on conduct of—Belief in truth of statements published—Misdirection—New trial.*

An appeal by the defendant from an order of a Divisional Court, 29 O. R. 616, 18 Occ. N. 339, ordering a new trial in an action brought by the solicitor for the corporation of the city of Chatham against the publishers of the *Chatham Daily Planet*, for publishing an alleged libel reflecting on the plaintiff personally and in his professional character.

The jury found a verdict for the defendant; but the Divisional Court held that, although the discussion of the conduct of the solicitor for a municipal corporation is a matter of public interest, and a newspaper is entitled to criticize and make fair comments thereon, yet the statements on which the criticism or comment is based must be true, and not merely believed to be true on reasonable grounds; and a new trial was ordered on the ground of misdirection.

*Held*, that this Court would not be justified in interfering with the discretion of the Divisional Court in granting a new trial. No doubt, a fair and *bona fide* comment on the conduct of a public officer, which the solicitor might be considered to be, is an excuse for what would otherwise be a defamatory publication. The very statement, however, that this rule assumes the matters of fact commented on to be ascertained; it does not mean that a man may invent facts and comment on the facts so invented, in what would be a fair and *bona fide* manner on the supposition that the facts



were true. The questions which would be raised at the trial of such a defence are (1) the existence of a certain state of facts; (2) whether the publication is a fair and *bona fide* comment on those facts. If the facts do not exist, the foundation of the defence fails. It was to be gathered from several passages in the Judge's charge that that was his view; but in some portions of his charge he used language from which the jury might have inferred that if the publisher of the defamatory matter believed it to be true, that would justify the criticism, adding, however, "on reasonable grounds." That was rather a loose expression. If it meant, that to show merely an honest belief in the truth would be sufficient, the Court could not concur in that view. It might be a very good reason for giving moderate damages; but nothing short of the actual truth of the facts commented on would support the plea, unless, perhaps, such an investigation of the facts as would justify any reasonable man in believing them to be true; and such ought to be law, if it is not. No evidence of a *bona fide* effort to ascertain the truth of the facts commented on was given in this case.

Appeal dismissed with costs.

King, Q.C., for the appellant.

Shepley, Q.C., for the plaintiff.

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ROSE, J.]

[24TH JANUARY, 1899.

### OCKBURN v. IMPERIAL LUMBER COMPANY.

*Waters and watercourses—Timber—Saw Logs Driving Act—R. S. O. 1887 c. 121—Arbitration and award.*

When a person floating logs down a stream fails to break jams of such logs, as directed by s. 3 of the Saw Logs Driving Act, another person whose logs are obstructed by the jam has no right of action for damages, but is limited to the remedy given by the Act, namely, the breaking of the jam at the expense of the person whose logs have formed it.

When an arbitrator awards one sum in respect of matters some of which are within and some without his jurisdiction, the award must be set aside.



misled the lessee to the latter's prejudice in reference to a fact within his own knowledge and in reference to which there was a legal obligation upon him to state the truth.

*Per OSLER, J.A.*, that, on the evidence, the plaintiffs were not deceived or misled by the notice, and were not entitled to damages.

*Per MACLENNAN, J.A.*, that there was a disposal of the building within the meaning of the proviso, but that, even if there was not, there was no right of action in the nature of an action of deceit, the notice having been given in good faith; and no right of action for breach of the covenant for quiet enjoyment, the notice, if bad, not affecting the lessees' rights.

In the result the judgment of *ROSE, J.*, 29 O. R. 75, 18 Occ. N. 64, was affirmed.

*Watson, Q.C.*, and *S. C. Smoke*, for the appellant.

*S. H. Blake, Q.C.*, and *F. C. Cooke*, for the respondents.

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FALCONBRIDGE, J.]

### RIELLE v. REID.

*Fraudulent conveyance—Company—Fictitious incorporation—Election of remedies.*

When an insolvent trader forms, in accordance with the requirements of the Ontario Companies Act, a limited liability company, and conveys his assets to it, it cannot, in an action by his creditors, be treated as his mere alias and agent and the conveyance set aside.

*Salomon v. Salomon*, [1897] A. C. 22, applied.

A creditor cannot take the benefit of the consideration for a conveyance and at the same time attack the conveyance as fraudulent; and, therefore, where creditors seized shares in a company allotted to their debtor, in consideration of the conveyance by him of his assets to the company, it was held that they could not attack the conveyance.



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In the result the judgment of ROSE, J., 29 O. R. 75, 18 Occ. N. 64, was affirmed.

*Watson, Q.C.*, and *S. C. Smoke*, for the appellant.

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Judgment of FALCONBRIDGE, J., 28 O. R. 497, 1

*Emerson Coatsworth*, for the appellant the liquidator

*F. E. Hodgins*, for the appellant M. Reid.

*S. H. Blake*, Q.C., and *T. C. Thomson*, for the respondents.

## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON J., 10TH JANUARY 1892.]

*In re* CANADIAN NIAGARA POWER CO.

*Contract—Construction—Dependent or independent covenants—Forfeiture.*

To determine whether covenants or agreements dependent or independent, they are to be construed according to the intent and meaning of the parties to be collected from the instrument, and to the circumstances legally admitted in evidence with reference to which it is to be construed. Where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract.

*Graves v. Legg*, 9 Ex. at p. 716; *Bellini v. Gye*, 1 Q.B. 183; and *Gladholm v. Hayes*, 2 M. & G. 257, referred to.

An agreement, under seal, dated the 2nd April 1892, between the Commissioners for the Queen Victoria Park and the above named company, recited that the company had applied to the commissioners for the privilege to take water from the Niagara river at a point or points in the park, in order to generate electricity and pneumatic power for transmission beyond the park, and witnessed *inter alia* as follows:

1. That, for the purpose recited, the commissioners had granted to the company a license irrevocable, save as to the term after limited, to take water, etc.

4. That the license granted was for the term of five years from the 1st May, 1892, at a fixed rental; provided that on re-entry and termination of the term upon the rental being in arrear for three months.

9. That the commissioners should not grant to any other person any right to use the waters of the river within the park so long as the agreement was in force, nor should the commissioners themselves use the water to generate power except for the purposes of the park, save as regards the exceptions contained in paragraph 12.

"10. The company undertake to begin the works hereby licensed to be constructed by them on or before the 1st of May, 1897; and to have proceeded so far with the said works on or before the 1st of November, 1898, that they will have completed water connections for the development of 25,000 horse power, and have actually ready for use, supply, and transmission 10,000 developed horse power by the said last mentioned day."

12. That the company might agree to supply electricity, etc.

"13. If the company should at any time or times continuously neglect *for the space of one year* effectually to generate electricity or pneumatic power as hereby agreed by the company, unless hindered by unavoidable accident, the Lieutenant-Governor in Council may then and from thenceforth declare this agreement, the liberties, licenses, powers, and authorities thereby granted, and every one of them, to be forfeited, and thenceforth the same shall cease and determine, and be utterly void and of no effect whatever."

The company failed to proceed with the works on or before the 1st November, 1898, so as to comply with paragraph 10, not having been hindered by unavoidable accident.

*Held*, that the agreement was not by reason of such failure determined, void, and of no effect, nor could it be so declared by the park commissioners.

2. That the Lieutenant-Governor in Council, or the commissioners, could not, by reason of the non-generation of electricity by the 1st November, 1898, or by reason of the failure of the company to proceed, declare the agreement forfeited.

3. That the Government and the commissioners were not relieved from the agreement contained in paragraph 9.

*Per* MEREDITH, C.J.—Paragraph 10 is to be treated as a promise or covenant, and not as a condition, (1) because of

its form; (2) because the stipulation does not go to the consideration, and is, therefore, a subsidiary rather than a vital one; (3) because the agreement contains an express provision for forfeiture, in certain event of breach of paragraph 13.

And *semble*, that a breach of the undertaking contained in paragraph 10 is within the provisions of paragraph 13.

*Irving, Q.C.*, and *Lash, Q.C.*, for the Crown and the Commissioners.

*Wallace Nesbitt* and *Monro Grier*, for the company.

[FALCONBRIDGE, J., STREET, J., 30TH JANUARY 1912.]

*In re* CENTRAL BANK OF CANADA.

### HOGABOOM'S CASE.

*Company—Winding-up—Balance in hands of liquidator—Payment to Receiver-General—R.S.C., c. 129 s. 41—52 V. c. 32, s. 20—Appeal—Master—Appeal—Forum.*

This was an appeal from the ruling of the Master of the Court of Ordinary as to the proper disposition of the moneys received by the liquidators into Court by the trustees of the Hogaboom estate, pursuant to the order of the Court of Appeal, 24 A. R. 470, 28 N. 281, affirmed by the Supreme Court of Canada, 28 S. C. R. 192, 18 Occ. N. 212, being the balance in the hands of the liquidators of an insolvent bank after passing their final accounts, which had been erroneously paid out to the trustees.

*Held*, that under 52 V. c. 32, s. 20, the Court of Appeal has jurisdiction to entertain the appeal.

*Held*, also, that the judgments of the Court of Appeal and of the Supreme Court were conclusive on the point that the money was the property of the Receiver-General for the Province of Ontario under R. S. C. c. 129, s. 41, subject to the liability of the Receiver-General to pay it over to the persons entitled thereto.

*F. E. Hodgins*, for the Receiver-General.

*J. C. Kerr, Q.C.*, for the creditors.

*F. W. Harcourt*, for the liquidator.



[BOYD, C., FERGUSON, J., 2ND FEBRUARY, 1899.

REGINA v. GUITTARD.

*Liquor License Act—Dominion brewer's license—Wholesale license—Sale in license district to unlicensed person—R.S.O. c. 245, ss. 34, 51.*

A brewing company held the Dominion license referred to in s. 51 (1), of the Ontario Liquor License Act, R. S. O. c. 245, and also a Provincial wholesale license, as defined by s.-s. 4 of s. 2 of that Act. They sold, through their manager, the defendant, liquor in wholesale quantities to an unlicensed person in the district in which they were licensed to sell by wholesale.

*Held*, that the sale was authorized under s. 51 (3) of the Act; and it was not requisite for the company to take out another wholesale license in the form issuable under s. 34.

And the defendant's conviction was quashed.

*Haverson*, for the defendant.

*J. R. Cartwright*, Q.C., for the Crown.

*Langton*, Q.C., for the prosecutor.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 1ST FEBRUARY, 1899.

FRANCHOT v. GENERAL SECURITIES CORPORATION.

*Writ of summons—Service out of jurisdiction—Breach of contract within Ontario—Defective affidavit—Leave to supplement on appeal—Terms—Amendment—Costs—Undertaking.*

The plaintiff, desiring to bring an action against an incorporated company having its head office outside of this Province, for breach of a contract, obtained, *ex parte*, from a local Judge, an order for leave to issue a writ of summons for service out of the jurisdiction. The particular breach upon which the plaintiff relied was not set out either in the affidavit upon which the order was granted, nor in the writ when issued, nor in the statement of claim which accompanied it when served on the company abroad, and, looking at the terms of the contract, which was made an exhibit to the affidavit, there were two possible breaches upon which the plaintiff might have relied, viz., the agreement of the defendants

to pay a sum of money at a place in this Province, or an agreement to allot certain shares, which might have been performed outside the Province for all that was proved to the contrary.

*Held*, that if the former were the breach relied on, the action was properly brought in this Province; if the latter was not.

An order having been made by a Judge in Chambers setting aside the order of the local Judge and the writ of service, the plaintiff appealed to a Divisional Court, which permitted him to file a further affidavit making out a *facie* case of a breach in this Province entitling him to sue here, and made a substantive order allowing the service on proper terms as to amendment and costs, and an undertaking by the plaintiff to show at the trial a breach of the contract within Ontario, or be nonsuit.

*Watson*, Q.C., for the plaintiff.

*E. D. Armour*, Q.C., for the defendants.

[2ND FEBRUARY]

### JOHNSTON v. ROGERS.

*Contract—Correspondence—Quotation of prices—Acceptance.*

The defendants, dealers in flour, wrote to the plaintiffs, bakers, that they wished to secure their patronage and customers, and quoting prices and terms for specified kinds of flour, adding a suggestion that the plaintiffs should "wire to order." The plaintiffs answered by telegram that they would take two cars "at your offer of yesterday."

The defendants did not deliver the flour, and the plaintiffs sued for damages for non-delivery.

*Held*, that there was no contract.

*Harty v. Gooderham*, 31 U. C. R. 18, distinguished.

*Hellmuth*, for the plaintiffs.

*W. Carleill-Hall* and *J. W. Payne*, for the defendants.

[7TH FEBRUARY, 1899.]

## LEGGATT v. BROWN.

*Contract—Consideration in part illegal—Stifling prosecution.*

*Held*, affirming the judgment of MACMAHON, J., 29 O. R. 530, 18 Occ. N. 291, that the promissory notes sued upon in this action were given on an illegal agreement of which the plaintiff must be taken to have had knowledge; that the whole agreement, being based upon the understanding that one of the defendants was to be discharged from custody, was illegal and void; and the plaintiff could not properly litigate the right to certain other promissory notes transferred by one of the defendants to another.

*Aylesworth*, Q.C., and *George Kerr*, for the plaintiff.

*Wyld*, for the defendants A. A. Brown and Baker.

*Fripp*, for the defendant W. E. Brown.

[8TH FEBRUARY, 1899.]

## HOWELL LITHOGRAPHIC CO. v. BRETHOUR.

*Company—Corporate name—"Limited"—Abbreviation in contract—Liability of directors—Right of action—Vested right—Statutes—"Stay" clause—Retroactivity.*

An appeal by the defendants from the judgment of the County Court of Wentworth in favour of the plaintiffs for the recovery of \$160.50 from the defendants, who were the five directors of the Burford Canning Company, an incorporated company. The claim arose upon a bill of exchange drawn by the plaintiffs upon the Burford Canning Company for the price of work done, which was on its face, addressed to "The Burford Canning Co.," and accepted by the drawees by the signature, "The Burford Canning Co., Ltd." The acceptance was given a few days after the royal assent had been given to the Ontario Act 60 V. c. 28, s. 22 of which provided that in the case of contracts by limited liability companies the word "limited" should be written or printed in full, a previous statute, 52 V. c. 26, ss. 2 and 3, having made the directors liable for the amounts due upon such contracts where the word "limited" did not appear. The

writ of summons in this action was issued on the very day on which the royal assent was given to the Act 61 V. c. 4 of which suspended the operation of the Act of the previous session.

*Held*, that the use of the abbreviation "Ltd." was a compliance with 52 V. c. 26, s. 2, which requires the "limited" to be distinctly written or printed after the name of the company.

*Held*, also, that the address to the "Burford Cement Co." in the draft was the first place in which the name of the company appeared in the contract, but that the fact that it had been so written there by the plaintiffs did not entitle them to recover. If the company chose to execute a contract containing that description of their corporate name they must be taken to have done so with the knowledge that they were at the same time making the contract personally binding upon their directors.

*Held*, also, that no stay was created by 61 V. c. 1, s. 2 of any action but one brought under 60 V. c. 28, s. 2, and the corresponding section of the revision of 1897, and that, upon this view of the effect of 52 V. c. 26, s. 2, the plaintiffs were entitled to recover.

If, however, the use of the contraction "Ltd." was a compliance with the last mentioned section, the plaintiffs were still entitled to recover, because the contract was made many days after the passing of 60 V. c. 28, s. 22, which required the unabbreviated word "limited" to be used; and the plaintiffs, upon the execution of the contract by the Burford Cement Company, Limited, became and remained entitled to look to the directors personally, and had a vested right of action, with which the "stay" clause, s. 4 of 61 V. c. 1, could not interfere, there being nothing in it which required the Court to hold it to be retrospective.

Appeal dismissed with costs.

*Aylesworth*, Q.C., for the defendants.

*D'Arcy Tate*, for the plaintiffs.

[9TH FEBRUARY, 1899.]

## JOHNSTON v. DULMAGE.

*Bankruptcy and insolvency—Assignee for benefit of creditors—Costs of action brought by—Remuneration and disbursements of—Liability of creditors—Indemnity.*

An assignee for the benefit of creditors, under the Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate; and so, too, with regard to his remuneration for and disbursements in winding up the estate.

*Walkem*, Q.C., for the plaintiff.

*Aylesworth*, Q.C., and *Deroche*, Q.C., for the defendants.

[18TH FEBRUARY, 1899.]

## LINDSAY v. ROBERTSON.

*Landlord and tenant—Creation of new term by overholding—Delivery of keys—Continued occupation of part of premises—Use and occupation—Evidence of value.*

Down to the 12th February, 1898, the defendants were tenants to the plaintiff at \$1,000 a year, payable quarterly, of the whole of the plaintiff's premises, including a single room which was occupied at the time of the commencement of the tenancy by a person who continued in occupation and paid rent to the defendants, for a term which expired on the 12th February, 1898, but which the defendants had the right to renew for the further term of two years. Before the expiration of the term the defendants notified the plaintiff that they did not intend to exercise their option, and her solicitors advertised for, but were not successful in finding, a new tenant. The defendants within two or three days after the 12th February sent the keys of the premises to the plaintiff, who returned them at once. The occupant of the single room continued in possession thereafter.

*Held*, that the defendants should not, by reason of their not having delivered up the keys at the expiration of their

term or by reason of the continued occupation of the room, be taken to have exercised the option of keeping premises for the extended period of two years.

*Held*, however, that the defendants were liable for use and occupation, upon the principle of the decision in *King v. Crethorn*, 1 Esp. 57.

The plaintiff, in her pleadings, made no claim to the premises for use and occupation, but the defendants' counsel, at trial, waiving objection on this ground, proposed to offer evidence of the value of the premises, which was objected to by counsel for the plaintiff, and the objection sustained after a formal tender of the evidence.

*Held*, that the evidence was improperly rejected; no particular contract was to be inferred from the fact of a lease over after the expiration of a term; the former rent was some evidence of the value of the premises, but evidence which might be rebutted.

Judgment of the County Court of Elgin reversed.

*E. D. Armour*, Q.C., for the appellants, the defendants.

*W. K. Cameron*, for the plaintiff.

## IN CHAMBERS.

[MEREDITH, C.J., 4TH FEBRUARY 1891.]

*In re LAZIER.*

*Extradition—Private prosecutor—Authority of foreign Government—Evidence—Fraud—False pretences—Treaty—Schedule to Extradition Act.*

Motion on behalf of Marcus Lazier, after the return of writs of *habeas corpus* and *certiorari*, for his discharge from custody under a warrant for his committal for extradition to the United States of America, issued by the junior Judge of the County Court of Hastings, acting as Extradition Judge, under R. S. C. c. 142, upon four charges of forgery, two of receiving money obtained by fraud, and one of obtaining money by false pretences.

*Held*, that it was not necessary that it should appear on the face of the extradition proceedings, under R. S. C. c. 142, that the informations or complaints against the prisoner were laid or made by or under the authority of the foreign Government; but the extradition Judge might receive the complaint of any one who, if the alleged offence had been committed in Canada, might have made it.

Canadian enactments and practice in this regard contrasted with these of the United States.

*Held*, also, that there was ample evidence of acts done by the prisoner which, if they had been done in Canada, would have justified his committal for trial on each of the four charges of forgery upon which he was committed.

*In re Murphy*, 26 O. R. 163, followed.

But the committal on the three charges of receiving money obtained by fraud was not warranted by the evidence; nor was the committal on the charge of false pretences justified, that not being one of the offences included in the treaty arrangements with the United States, and the fact that it is one of the offences mentioned in the schedule to the Extradition Act, R. S. C. c. 142, making no difference.

*R. G. Smyth*, for the prisoner.

*J. W. Curry*, contra.

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[ROBERTSON, J., 5TH FEBRUARY, 1899.]

*In re HARRISON.*

*Money in Court—Infants—Payment out—Surrogate guardian.*

Money paid into Court to the credit of infants will not be paid out to their guardian appointed by a Surrogate Court, upon his application, as a matter of right; though, in a proper case, an allowance for their maintenance and education may be made to him out of such money.

*In re Smith's Trusts*, 18 O. R. 329, followed.

*Huggins v. Law*, 14 A. R. 383, and *Hanrahan v. Hanrahan*, 19 O. R. 396, distinguished.

*W. Davidson*, for the guardian.

*J. Hoskin*, Q.C., for the infants.

## In the Surrogate Court of the County of York.

[McDOUGALL, SURR. J., 18TH JANUARY 1900.]

*In re McNAB.*

*Costs—Solicitor-trustee—Proceeding in Surrogate Court.*

A solicitor-trustee, acting on behalf of himself and his co-trustees, is entitled to profit costs for preparing the accounts of the trust and for attending the audit thereof before the Judge of a Surrogate Court.

*Re Corseilis*, 84 Ch. D. 675, followed.

Upon the passing of executors and trustees' accounts in the matter of the estate of Sophia McNab, Messrs. Foy & Kelly, solicitors, presented a bill of their costs as solicitors for the trustees for the preparation of the trustees' accounts and for attending the audit of the same. Mr. Foy, one of the firm of solicitors, was one of the executors and trustees, and Mr. Worrell, another solicitor, but not a member of the firm, was also an executor and trustee.

*Gibson Arnoldi*, for the life tenant, objected to the allowance of any profit costs to Messrs. Foy & Kelly, on the ground that the proceeding of passing accounts in the Surrogate Court was not such a proceeding as came within the principle of *Cradock v. Piper*, 1 Macn. & G. 664, and *Re Corseilis*, Ch. D. 675, authorizing a solicitor-trustee to receive costs.

*Shirley Denison*, for the trustees and the solicitors, contra.

McDOUGALL, SURR. J.—In *Cradock v. Piper*, 1 Macn. & G. 664, it was held that a solicitor-trustee, acting for his



and his co-trustee in the administration of the estate and certain other proceedings in litigation taken against the estate, was entitled to profit costs to the extent that he would have been entitled had he acted for the co-trustee only, and not for himself and his co-trustee jointly. In *Re Corsellis*, 34 Ch. D. 675, it was held that where a solicitor-trustee acted for himself and his co-trustee upon a summary application made on behalf of an infant for maintenance, to which they were respondents, he was entitled to profit costs.

It is interesting to note that in several cases which a solicitor-mortgagee was claiming profit costs where acting for himself and co-mortgagee, the Courts refused to extend to them the principle of the decision in *Cradock v. Piper*. See *Stone v. Lickorish*, [1891] 2 Ch. 363, and *Re Doody, Fisher v. Doody*, [1893] 1 Ch. 129. The English Legislature, however, appeared to be impressed with the anomaly, and in 1895 passed 58 & 59 V. c. 25, expressly allowing a solicitor-mortgagee to recover full costs, whether acting for himself alone or for himself and co-mortgagee.

*Cradock v. Piper* and *Re Corsellis* have been followed in our own Courts in *Strachan v. Ruttan*, 15 P. R. 109, and in *Re Mimico Sewer Pipe Co.—Pearson's Case*, 26 O. R. 289.

The Surrogate Court is a Court of Record, and proceedings therein may be commenced in several ways. In the matter of contesting a will, by filing caveat, whereupon pleadings follow until an issue or issues are reached, when the case is set down for trial before the Judge; by citation, or, under the new Rules, by a Judge's order, as in the case of calling upon executors or next of kin to prove a will or take out letters of administration; by petition, as when executors or administrators seek to have their accounts duly passed and audited and their compensation as such executors fixed and allowed. In these latter proceedings, upon such petition an appointment or summons is signed by the Judge notifying all parties in interest to appear if they desire to be represented at such passing of accounts. The proceedings on any such audit, save where there is fraud or mistake, as to all persons notified of such audit or present thereat, are de-

clared to be binding upon all such persons, even if subsequent proceedings are taken in the High Court: 59 V. c. 5. I cannot distinguish, therefore, between a summary proceeding, if not of a higher nature, in the Surrogate Court or a Court of Record—commenced by petition, and a summary proceeding commenced in the High Court by summons. Neither need be a hostile proceeding: *Re Corsellis*: to a solicitor-trustee, acting for himself and a co-trustee, to recover profit costs.

I must, therefore, allow Messrs. Foy & Kelly a reasonable bill of costs, as between solicitor and client, for making the accounts of this estate and for attending thereto thereof.

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## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

MEREDITH, J.]

[24TH JANUARY, 1899.

ROBINSON v. PURDOM.

*Easement—Right of way—Limited grant—Colourable user.*

A right of way granted for the benefit of a specific lot cannot be used by the owner of that lot generally, apart from his ownership and use of the lot.

Judgment of MEREDITH, J., affirmed.

*Purdom*, for the appellant.

*D. J. Donahue*, for the respondent.

## IN CHAMBERS.

[OSLER, J.A., 22ND FEBRUARY, 1899.

SHERLOCK v. POWELL.

*Security for costs—Appeal—Court of Appeal—R. S. O. c. 153, s. 39 (2)—Rule 826.*

Rule 826 is applicable to an appeal under s. 39 (2) of the Mechanics' Lien Act, R. S. O. c. 153, by the respondent in the Court below from the order of a Divisional Court reversing the judgment upon the trial of a mechanics' lien action, where the amount in question is more than \$100 and not more than \$200; and therefore security for the costs of such an appeal must be given, unless otherwise ordered.

*Starr*, for the plaintiff.

*Aylesworth, Q.C.*, for the defendant.

[28<sup>TH</sup> FEBRUARY]

## SMALL v. HENDERSON.

*Security for costs—Application for, after judgment—Appeal to Appeal.*

Where the judgment of the High Court is against the defendant, and he is appealing to the Court of Appeal, he is entitled to an order requiring the plaintiff to give security for costs.

Where the defendants would have been entitled to an order at the commencement of the action, but did not obtain it because they feared that it would be set aside on appeal by the plaintiff, though resident out of the jurisdiction, and having property within it, an application after judgment, upon the ground that the plaintiff had ceased to own property within the jurisdiction, was refused by a Judge of the Court of Appeal.

*Exchange Bank v. Barnes*, 11 P. R. 11, followed.

*James Bicknell*, for the defendants.

*J. G. Hay*, for the plaintiff.

## HIGH COURT OF JUSTICE.

[BOYD, C., MOSS, J.A., 2<sup>ND</sup> FEBRUARY]

## SILVERTHORN v. GLAZEBROOK.

*Mortgage—Consolidation—Derivative mortgage—Parties—Redemption.*

The plaintiff sought to consolidate, as against the defendant, securities which were held by the plaintiff, first as mortgagee of land of which the defendant was the owner, and of the equity of redemption, and next as derivative mortgagee under a security mortgaged by the defendant to the plaintiff.

*Held*, that he had a right to do so, for the doctrine of consolidation is applicable wherever, at the date when redemption is sought, two mortgages are united in one person and redeemable by the same person.

*Held*, also, that the action was rightly constituted, for the sub-mortgagee may foreclose the original mortgagee without making the original mortgagor a party.

*J. B. O'Brian*, for the plaintiff.

*G. G. Mills*, for the defendant.

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[BOYD, C., FERGUSON, J., 8TH FEBRUARY, 1899.]

REGINA v. LEVY.

*Municipal corporations—By-law of police commissioners—Second-hand shops—By-law prohibiting dealing with minors.*

*Held*, that s. 484 of the Municipal Act, R. S. O. c. 223, which provides that "the board of commissioners of police shall, in cities, license and regulate second-hand shops and junk stores," does not authorize a by-law to the effect that "no keeper of a second-hand store or junk store shall receive, purchase, or exchange any goods, articles, or things from any person who appears to be under the age of eighteen years."

Such a by-law is bad as partial and unequal in its operation as between different classes, and involving oppressive or gratuitous interference with the rights of those subject to it, without reasonable justification.

*DuVernet*, for the defendant.

*H. Guthrie*, for the prosecutor.

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McDONALD v. GAUNT.

*Bills of sale—Antedated chattel mortgage—Date of execution—Validity.*

*Held*, that a chattel mortgage was not invalid because dated the 16th March, though not in fact executed until ten days later, it having been duly filed within five days from the date of actual execution.

The nominal date of a chattel mortgage is immaterial. It takes effect from and after the date and time of actual execution; nor is there any requirement that it shall be ex-

ecuted within so many days of the actual sale of the property comprised in it.

*C. J. Holman*, for the plaintiff.

*H. Morrison*, for the defendants.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 14TH FEBRUARY 1900.]

*In re* FARMERS' LOAN AND SAVINGS COMPANY,  
DEBENTURE HOLDERS' CASE.

*Company—Winding-up—Creditors—Priorities—Debenture holders—Power to pledge assets—Directors—Form of debenture—Nature and extent of.*

This company being in liquidation under the Winding-up Act, a claim was made on behalf of the holders of the company's debentures that they were entitled to be paid out of the assets of the company in priority to depositors.

The company was formed on the 19th October 1871 under C. S. U. C. c. 53, which consolidated the Building Societies Act, 9 V. c. 90, with the Acts amended by s. 38 the right of a society formed under it to borrow money, if authorized by its rules to do so, was retained. Subsequent legislation (e.g., 37 V. c. 50 (D.) and 1877 c. 164), too, had practically converted what were originally building societies into loan companies, and had conferred largely increased borrowing powers upon the latter.

By Rule 7 of the company, passed under the authority of s. 2, the directors were authorized to borrow money on the use and on the assets of the company, to receive deposits, and to "loan" or invest such money either on mortgage on real estate or in any other way they might think best for the interests of the institution.

*Held*, that this company was invested with the power to borrow money for its purposes, and to give security for the money borrowed on the assets of the company.

*Murray v. Scott*, 9 App. Cas. 519, followed.

And this power to pledge the assets was one which had been delegated to the directors under C. S. U. C. c. 53.

The debentures upon which the claimants relied were headed "Land Mortgage Debenture," and contained a promise by the president and directors to pay to the person named a certain sum at a particular time and place, with interest, and were signed by the president and secretary, under whose signatures were the following words: "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada."

*Held*, that these instruments created a charge upon the property of the company.

*Per* ROSE and MACMAHON, JJ., that such charge was upon the capital and assets of the company invested in mortgages on approved real estate situate in the Dominion of Canada at the date of the winding-up order.

*Per* MEREDITH, C.J., that the charge was such as entitled the debenture holders to be paid out of the assets of the company in priority to the depositors and other creditors.

Ruling of the Master in Ordinary reversed on appeal.

*J. T. Small* and *R. B. Henderson*, for the appellants, certain of the debenture holders.

*Wallace Nesbitt*, *C. W. Beatty*, and *Glyn Osler*, for other debenture holders.

*W. N. Miller*, Q.C., for the Dominion Bank.

*J. K. Kerr*, Q.C., and *William Macdonald*, for certain of the depositors.

*W. M. Douglas* and *F. B. Osler*, for the liquidator.

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[ARMOUR, C.J., STREET, J., 17TH FEBRUARY, 1899.]

*In re* THOMAS AND SHANNON.

*Will—Devise—Restraint on alienation—Repugnancy—Invalidity—Contingent executory interest—Remoteness—Perpetuities—Title by possession.*

An appeal by the vendor from the decision of FERGUSON, J., *ante* 12, was dismissed with costs.

*Clute*, Q.C., for the appellant.

*E. D. Armour*, Q.C., for the purchaser.

[MEREDITH, C.J., MACMAHON J., 20TH FEBRUARY]

## CLIFTON v. CRAWFORD.

*Parties—Action against executor for legacy—Person to whom leg*

A testator gave legacies to three grandchildren paid at majority or marriage, and provided: "In the death of any one of my said grandchildren, the . . . shall be divided among and go to the survivors of them, share and share alike." All three survived the testator, but two died before marriage or marriage and the executor paid all three legacies to the surviving plaintiff, the personal representative of the grandchild who was the second to die, brought this action against the executor to recover one-half of the legacy of the grandchild who died first.

*Held*, that, as a determination of the proper construction of the will was necessary to entitle the plaintiff to the legacy, it was not an improper exercise of discretion to require the surviving grandchild, or his representative, to be a party, so as to prevent an adjudication being had as to his right under the will, behind his back, and to have the matter decided in one action.

*Cornell v. Smith*, 14 P. R. 275, referred to.

*J. E. Cook*, for the plaintiff.

*Justin*, for the defendant.

[BOYD, C., MOSS, J.A., 21ST FEBRUARY]

## PEOPLE'S LOAN AND DEPOSIT CO. v. DAVIDSON.

*Indigent debtor—Discharge from custody—Examination—"Satisfactory" meaning of—Affidavits—Appeal.*

The expression s. 9 of the Indigent Debtors' Act, S. O. c. 81, "if the matter thereof is deemed satisfactory," referring to the examination of the debtor—means, fully and credibly gives the information called for by the *examination* questions." The object of the statute and the examination is to test the verity of the statement that the debtor is herewith to pay—that he is in fact an indigent debtor.



if he fully and fairly discloses his dealings with his property so as to make it appear that his affidavit is correct, and that he has in truth no means in his possession or under his control to pay any part of the claim, then he should be discharged from custody, even though he may have fraudulently disposed of his property, and although his manner of dealing therewith may have been unsatisfactory for that reason.

*Wallis v. Harper*, 3 P. R. 50, *Hesketh v. Ward*, 4 U. C. L. J. N. S. 176, and *Foster v. Van Wormer*, 12 P. R. 597, followed.

*Held*, also, that affidavits could be looked at upon a motion for discharge of the defendant, to supplement the examination, but only as an indulgence where filed after the appeal was launched.

*Wallace Nesbitt and Tytler*, for the defendant.

*Aylesworth, Q.C.*, and *J. H. Moss*, for the plaintiffs.

[*ARMOUR, C.J.*, *FALCONBRIDGE, J.*, *STREET, J.*, 25TH FEBRUARY, 1899.

#### McINTYRE v. SILCOX.

*Life insurance—Benefit of children—Alteration of apportionment, by will—Gift to others and to grandchildren—Validity of, as against creditors—Cancellation and re-issue of policies.*

Judgment of *MEREDITH, J.*, 29 O. R. 593, 18 Occ. N. 344, affirmed.

*J. A. Robinson*, for the appellant.

*T. W. Crothers*, for the respondents.

[*BOYD, C.*, *FERGUSON, J.*, *ROBERTSON, J.*, 1ST MARCH, 1899.

#### REGINA v. MOUNT.

*Liquor License Act—Conviction under—Sale to inebriate—Order forbidding—Requisites of—R. S. O. c. 245, s. 124.*

The defendant, a licensed tavern keeper in the city of C., in the county of K., was convicted under s. 124 of the Liquor License Act, R. S. O. c. 245, of selling liquor at a specified time and place to a certain person, "knowing that the sale

of liquor to the said J. H., a drunkard, was prohibited by an order in open Court," made by the convicting magistrate.

Upon the conviction being removed by *certiorari*, the "order" returned was a memorandum signed by the magistrate, running thus: "I make an order forbidding any licensed person giving liquor to J. H., in the county of York, for one year."

It did not appear where and in what circumstances the order was made; whether in open Court; whether after summing up to J. H.; whether excessive use of liquor by him was proved or admitted—or not.

*Held*, that the conviction was bad, and there was no evidence in the evidence by which it could be amended.

*Semble*, ROBERTSON, J., dissenting, that if there was a proper order brought to the knowledge of the defendant, there would be a violation of the law in making a sale of liquor to the inebriate, though the liquor was given to and consumed by other persons on the licensed premises.

*Haverson*, for the defendant.

*M. Wilson*, Q.C., for the complainant.

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[ROSE, J., 18TH FEBRUARY 1891.]

## RANDALL v. ATKINSON.

*Evidence—Admissibility—Death of witness before cross-examination.*

*Held*, upon a review of the authorities, that the declarations of the defendant taken on his own behalf upon oath in reference to the reference were admissible in evidence, notwithstanding that he had died pending an adjournment of the reference, so that the plaintiff had been deprived of the opportunity of cross-examining him.

*Wallace Nesbitt*, for the defendant by revivor.

*W. M. Douglas*, for the plaintiff.

## IN CHAMBERS.

[BOYD, C., 30<sup>TH</sup> JANUARY, 1899.]*In re* SOLICITORS.*Solicitor — Bill of costs — Payment — Delivery — Equivalent — Examining dockets.*

Where no bill of costs has been delivered by a solicitor to his client, there cannot be payment within the meaning of s. 49 of the Solicitors Act, R. S. O. c. 174, which refers to the payment of a delivered bill.

And where one of the solicitors and their client, according to the solicitor's evidence, together examined the items in the solicitors' dockets, which amounted to over \$1,500, and the solicitor explained that certain entries had not been made which would amount to \$300, and the client paid the solicitors \$1,500 in full settlement:—

*Held*, that this was not equivalent to the delivery of a bill and payment after consideration.

*W. H. Blake*, for the solicitors.

*Kilmer* for the client.

[MEREDITH, C.J., 21<sup>ST</sup> FEBRUARY, 1899.]*In re* WHITTY.*Will—Gift—Mistake in name of donee—Validity—Declaration—Originating notice—Rule 938.*

A testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, and Maria Cummins.

*Held*, that the gift took effect in favour of Maria Cummins.

*Held*, also, that a declaration to that effect could properly be made upon an originating notice under Rule 938.

*In re Sherlock*, 18 P. R. 6, followed.

*Heggie*, for the executors and adult next of kin of testator.

*A. McKechnie*, for Maria Cummins.

*F. W. Harcourt*, for the official guardian.

[FALCONBRIDGE, J., 24TH FEBRUARY.]

*In re CAMPBELL.*

*Infant—Maintenance—Contingent interest—Life insurance.*

An order was made for payment, out of a fund in to which an infant was contingently entitled, of an allowance for his maintenance, upon security being given by way of insurance for the benefit of those who would be entitled at the death of the infant under full age.

*Re Arbuckle*, 14 W. R. 585, followed.

*Clute*, Q.C., for the applicant.

*J. Hoskin*, Q.C., for the infant.

[STREET, J., 18TH FEBRUARY.]

FLYNN v. COONEY.

*Interpleader—Seizure by sheriff under execution—Landlord's claim—Sheriff acting in interests of execution creditor—Delay—Order—*

A sheriff, having in his hands a writ of *fi. fa.* against defendant's goods, on the 23rd June, 1898, went in a hotel of which the defendant was the tenant, with the intention, and informed the defendant that he seized his furniture and effects. He then made a pencil memorandum of a number of articles stated to be in the house, most of which he did not see. Having done this, he left the house without notifying the judgment debtor that everything was seized, and accepting his verbal undertaking to hold him. This course was pursued in accordance with instructions from the solicitor for the execution creditor, in order to endeavour to get the defendant to make payments

count of the execution. On the 8th August the landlords of the defendant put in a bailiff to seize the same furniture and effects for rent due on the 6th August. The bailiff spoke to the sheriff, who said that he would not undertake to sell the goods and pay the rent. Nothing further was done until the 6th October, 1898, when the landlords put another distress warrant into the bailiff's hands for rent since accrued. The sheriff was notified of this in writing on the 29th October, and on the 7th November, 1898, he swore to an affidavit upon which he applied for an interpleader order, and in which he stated that he had remained in possession from the 23rd June until the time of the application. Being cross-examined, he said that he was only holding on till the landlords put him out of the place.

*Held*, upon the evidence, that the sheriff had been acting throughout in the interest of the execution creditor as against the interest of the claimants, and for this reason, as well as for his delay, was not entitled to an interpleader order.

*Semble*, that if an interpleader order were made, the issue would be as to whether there was a seizure by the sheriff, and if so, whether it was abandoned; and if there were a seizure continuing down to the time of the application, whether the rent due at the time of the seizure had been paid in full.

*W. H. Blake*, for the claimants.

*J. M. Clark*, for the sheriff.

*F. C. Cooke*, for the execution creditor.

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[8th MARCH, 1899.]

VENNARD v. TOWNSHIP OF BRUCE.

*Jury notice—Action against municipal corporation—Non-repair of bridge—*  
*R. S. O. c. 51, s. 104.*

An appeal by the plaintiff from an order of a local Judge striking out the plaintiff's jury notice as irregular and improper.

The action was brought to recover damages for injury sustained by the plaintiff by reason of the alleged negligence of the defendants in not keeping a certain bridge in repair.

By s. 104 of the Judicature Act, R. S. O. c. 51, it is provided that "all actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads or sidewalks, shall be tried by a Judge without a jury."

*Held*, having regard to the object of the enactment, it applied to a part of a highway formed by a bridge.

Appeal dismissed with costs to the defendants in the event.

*J. H. Moss*, for the plaintiff.

*W. H. Blake*, for the defendants.

## In the County Court of the County of Perth.

[BARRON, Co. J., 6TH FEBRUARY,

### HICKS v. JACOBS.

*Division Court—Jurisdiction—Defendant resident out of Ontario.*

An application by the plaintiff for a direction to the clerk of the Court to tax costs on the County Court scale, because although the amount of the plaintiff's judgment was within the jurisdiction of a Division Court, yet the claim was for damages which could not be sued in a Division Court, the defendant residing out of the jurisdiction, at the city of Montreal, in the Province of Quebec.

*F. H. Thompson*, for the plaintiff.

*J. P. Mabey*, for the defendant.

BARRON, Co. J.—The defendant resides in the city of Montreal, and because of this it is said the Division Court has no jurisdiction, and perforce of this the clerk should tax costs on the County Court scale.

It is said, and truly said, that invoking s. 105 (1) of R. S. O. c. 60, cannot give the Division Court jurisdiction, for the reason that the defendant has no agent in Ontario. Prior to the passing of 57 V. c. 23, the Division Court, it is clear, had no jurisdiction in a case such as this: *Ontario Glass Co. v. Swartz*, 9 P. R. 252; *Guy v. Grand Trunk R. W. Co.*, 10 P. R. 372. But the more recent Act, 57 V. c. 23, s. 12, now R. S. O. c. 60, s. 87 (1), provides that an action may be brought "notwithstanding that the residence of the defendant is, at the time of bringing the action, out of the Province of Ontario." The contention, however, is, that whatever may have been the intention of the Legislature, it has failed in reaching it, because, in the language of the section itself, such action is only "when it is by this Act provided that a claim may be entered or an action brought," and that these words mean and refer to the action against the defendant resident out of the jurisdiction, and nowhere in the Act is provision made for such action, and nowhere in the Division Courts Act, except ss. 89 and 95, is it provided "that a claim may be entered or an action brought," etc., and these sections clearly have no application. I, however, read the words "an action brought," etc., or "claim entered," etc., to mean simply an action of the proper competence of a Division Court, and inasmuch as the judgment in the action was for an amount within the competence of the Division Court (s. 72 (1) (c)) the statute means that it can be brought in the Division Court, notwithstanding the outside residence. If the section, instead of reading "a claim entered," "an action brought," had read "the claim entered," or "the action brought," then I could agree with the present contention of the plaintiff; and then, inasmuch as the Division Courts Act nowhere else provided for such an action, the particular section would be so much dead wood, and the Division Court could have no jurisdiction.

Application dismissed.

**In the Eighth Division Court in the  
Counties of Northumberland and Durham**

[KETCHUM, JUN. CO. J., 2ND MARCH,

**BONTER v. OHAPMAN.**

*Costs—Summary proceeding—Master and Servant Act—Justice of the  
Witness fees—Division Court—Appeal to—Costs of.*

This was an appeal by Bonter, the master, from a magistrate's order under the Act respecting Master and Servant, R. S. O. c. 157, directing the master to pay the servant wages and costs.

*J. W. Gordon, for the appellant.*

*George Drewry, for the respondent.*

KETCHUM, JUN. CO. J.—This is a summary proceeding to enforce payment of a debt, in which the legislature has seen fit to give jurisdiction to a justice of the peace, who, by s. 11, has power to direct the payment of wages due, not exceeding the sum of \$40, with costs. There is nothing which prohibits him from awarding witness fees as part of the costs. The Act R. S. O. c. 95 has not that effect, as it is confined to its application to criminal matters. He may allow witness fees as part of the costs by analogy to the powers of a Justice under the Division Courts Act, in which witness fees are treated and described as costs—see s. 215—and he should be governed by the Division Court tariff in fixing the amount.

The Division Court has no power to give costs of the appeal. That Court derives its power as to such appeals wholly from the Act respecting Master and Servant. The appeal is not an action or proceeding within the meaning of ss. 211 and 312 of the Division Courts Act, as those sections relate only to actions and proceedings had or taken under the authority of that Act. There is no express power to deal with the costs of appeal given to the Court by the Master and Servant Act, and the expression "costs awarded," in ss. 18 and 19, means costs awarded by the magistrate.

Appeal dismissed on the merits, and order of magistrate directed to be enforced by the officers of this Court. Order as to the costs of the appeal.



## NOVA SCOTIA.

## In the Supreme Court.

## IN CHAMBERS.

[McDONALD, C.J., 9TH FEBRUARY, 1899.]

## FRANKLYN v. PEOPLE'S HEAT AND LIGHT CO.

*Nuisance—Gas works—Injunction—Acquiescence—Statutory privilege.*

The plaintiff was owner and occupier for seventeen years of a valuable suburban property consisting of land in a high state of cultivation and ornamentation, and a dwelling-house where he lived with his wife, family, and servants. In 1896 the defendants, a company incorporated under Nova Scotia laws, purchased an adjoining property, and thereon erected extensive coke and gas works. This action was brought to restrain the defendants from polluting the air, destroying the vegetation, and fouling the water in, on, and about the plaintiff's property, and rendering his dwelling uninhabitable. Upon a motion for an interlocutory injunction, a great number of affidavits were read on the part of the plaintiff and defendants respectively, and upon these most of the deponents were cross-examined at length. The evidence as to the existence of smells and consequent discomfort was practically uncontradicted, but there was a diversity amongst the experts called to establish that the vegetation, trees, etc., had suffered as a consequence of the escape of gases. The medical witnesses, too, disagreed as to whether or not certain illnesses and skin and blood diseases affecting members of the plaintiff's household, had been caused by such gases. There was contradictory evidence, as well, regarding the fouling of the water in front of the plaintiff's premises.

*Held*, that, in view of the contradictory evidence as to effect on vegetation, injury to health, and fouling of water, it was neither necessary nor advisable to give an opinion until the jury at the trial had passed upon the facts.

*Held*, further, following *Bohan v. Jarvis Gas Light Co.*, 122 N. Y. 18, *Crump v. Lambert*, L. R. 3 Eq. 409, *White and Ward*, 1 Burr. 333, *Fleming v. Hislop*, 1 Cas. at p. 691, that it is not necessary in order to constitute a nuisance that there should be any injury to health, it be shown that the ordinary comfort of human existence is materially interfered with, that is enough.

Order made for an injunction restraining the defendants until the trial from causing offensive, noxious, or wholesome gases, vapours, or other noxious matter to emanate from their gas and coke works, and to spread over and about the plaintiff's premises, thereby contaminating the air around the house and premises, thus rendering the same unfit for comfortable use and enjoyment by the plaintiff and his family. The writ not to issue till ten days after the trial. Order. The plaintiff to have costs of order.

*Held*, also, that a smell alone may constitute a nuisance, and that the test as to whether a smell is such a nuisance will be restrained by injunction, is not whether it is strong and disagreeable as to be offensive to any sensitive nose, but whether it is so bad and continuous as to seriously interfere with the comfort and enjoyment of ordinary life. See, for example: *Beach on Injunctions*, sec. 1098; *Rapier v. Trustees of the Tramways Co.*, [1893] 2 Ch. 588; *Salvin v. North British Coal Co.*, L. R. 9 Ch. per Jessel, M.R., at p. 707.

It having been contended by counsel for the defendants that the delay of the plaintiff in the commencement of proceedings was acquiescence, for which contention were cited *Attorney-General v. Sheffield Gas Co.*, 3 DeG. M. & G. 613, and *Hogg v. Scott*, L. R. 18 Eq. 444, these cases were distinguished as not having been cases of continuous nuisance but completed for some time before action brought.

It was also contended for the defendants that the incorporation of the defendant company empowering it to acquire real estate and thereon to erect gas and coke works, gave them statutory authority which protected them in the absence of negligence in the management of the works.

*Held*, following *Managers of Metropolitan Asylum District v. Hill*, 6 App. Cas. 193, that the terms of the statute creating the corporation being not imperative, but permissive, they must exercise their statutory rights in strict conformity with prior private rights and that they held no legislative license to commit a nuisance in any place which might be selected for their purpose.

*Borden*, Q.C., and *Harris*, for the plaintiffs.

*Harrington*, Q.C., *Drysdale*, Q.C., *Mellish*, and *Covert*, for the defendants.

[This decision was affirmed by the Court *in banco*, 1st March, 1899; but the defendants were allowed two weeks' further time to abate the nuisance.]

## MANITOBA.

### In the Queen's Bench.

[FULL COURT, 9TH FEBRUARY, 1899.]

#### FOSTER v. RURAL MUNICIPALITY OF LANSDOWNE.

*Municipal corporations—Drainage—Damage by drain—Negligence in performance of work—Liability of municipality—Action—Arbitration.*

County Court appeal. The plaintiff sued to recover for injury alleged to have been done to his land and crop by the negligent and wrongful construction of a ditch by the corporation, in consequence of which water, diverted from its natural course and collected in the ditch, overflowed and was thrown on the plaintiff's land. Judgment was entered for the plaintiff for \$144. The defendants appealed, contending that the evidence disclosed no wrongful act, neglect, or default of theirs subjecting them to an action, and that the plaintiff could not recover by action, but must avail himself of the provisions of the Municipal Act respecting arbitration, to obtain relief.

*Held*, that the appeal should be dismissed with costs.

The ditch was dug wholly upon land under the control of the municipality, in pursuance of the statutory power and duty

to repair the public highways. The powers given, to maintain, or repair highways, must be exercised with regard for private rights, except in so far as authority to interfere with such rights is expressly or impliedly given. The evidence showed that the drainage could have been made as effective without damage to the plaintiff.

The damages for which compensation is given under s. 665 of the Municipal Act must be such as *necessarily* result from the exercise of the powers of the corporation, and damages before are not such as arise from negligence in doing the work.

Here the municipality made no inquiries and gave no specific instructions as to the nature, extent, or outlet of the ditch. All was left to the discretion of the foreman and the councillor. If the work had been done with due care no injury had ensued to the plaintiff from *vis major*, or from an event which could not reasonably have been foreseen and guarded against, the municipality might not have been liable.

It was not within the statutory powers of the municipality to cast the waters of the highway, or a swamp the ditch intended to drain, upon the plaintiff's land, or to divert them where they would naturally flow there to his damage, but this result having been due to negligent and improper construction of the ditch by the servants of the municipality acting within the scope of their employment, the plaintiff was entitled to recover compensation therefor by action.

*Metcalf and Sharpe*, for the plaintiff.

*James and Perdue*, for the defendants.

## JOHN WATSON MANUFACTURING CO. v. SAMUEL

*Promissory note—Failure of consideration—Statute of Limitations—Acknowledgment.*

County Court appeal. The plaintiffs sued to recover the amount of a promissory note dated 20th August, 1888, given by the defendant, payable to the Watson Manufacturing Company or order, on or before 1st January, 1891, "at the rate of 5 per cent. after due till paid." The note was given by the defendant pursuant to an order he had given the Watson Manufacturing Company for the delivery to him of a binder

the 24th March, 1888. The defences that defendant raised in his dispute note were that the plaintiffs' right to recover was barred by the Statute of Limitations, and that, as the plaintiffs had repossessed themselves of the binder for which the note was given, there had been an entire failure of consideration. It was an expressed condition both of the order and the note that the property in the machine was not to pass to the defendant until its price had been paid in full. In the order and note it was agreed that, on the happening of certain events the vendors should have the right to take possession and sell the machinery, "the proceeds thereof to be applied upon the amount unpaid of the purchase price." The plaintiffs resold the machine, and the amount realized was credited to the defendant on another note given by him for the machine. The note sued on was indorsed by the Watson Manufacturing Company to the plaintiffs, who employed a collection agency to collect the amount. On the 11th July, 1893, the association wrote the defendant for payment. On the 27th July the defendant wrote in reply to this letter, after mentioning that the Watson Company had sold the machine before the notes became due, "Therefore, I cannot see that this is an honest debt. The binder was sold to a good man, and I cannot see that I owe the firm anything but the last note and interest on it."

The County Court Judge held that the defence of failure of consideration was not tenable, and that the letter by the defendant of 27th July, 1893, was a sufficient acknowledgment to take the case out of the statute. The defendant appealed.

*Held*, that the appeal should be dismissed with costs. The inference to be drawn from the wording of the order and the note would be that the defendant was to remain liable for the balance of the purchase price after the proceeds of the re-sale had been credited thereon. As it was the express agreement of the parties that the defendant should remain liable for the balance after the credit of the proceeds of the sale, it could not be held that the contract had been rescinded by the re-sale of the machine, and the County Court Judge was right in holding that the defence of failure of consideration could not be supported: *Sawyer v. Pringle*, 18 A. R. 218.

The defendant's letter did not contain an express promise to pay, but it contained an acknowledgment of the defendant's indebtedness for the note sued on. There could be no doubt but that it was to this note he referred in the last clause of the letter. The collection association was the duty of the plaintiffs to collect the debt, and the defendant in writing the letter he did, believing that the association was for the holders of the note. The defendant's acknowledgment expressly included the interest on the note.

*Metcalfs and Sharpe, for the plaintiffs.*

*Bradshaw, for the defendant.*

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### MARSHALL v. MAY.

*Interpleader issue—Garnishment—Evidence of admissions made by Gaynor to moneys received by him.*

County Court appeal. One May, having a claim against Gaynor upon a note, sued and attached moneys in the hands of Macdonald, who paid the money into the County Court when it was claimed by Marshall & Co., and an interpleader issue was directed to try the question whether Marshall & Co. were entitled to the moneys as against May.

At the trial evidence was given of an agreement between Marshall & Co. and Gaynor by which he was to sell for Marshall & Co. as their agent, and account for all moneys received. The money had been received by Macdonald, a garnishee, as a deputy clerk of the Crown and Pleas, a constable who had arrested Gaynor on a criminal charge, and taken the money from him. Before the issue was directed attaching order Gaynor made certain admissions that the moneys received by Macdonald were the proceeds of moneys received by him from Marshall & Co. No other proof was given by the claimants. On behalf of the attaching creditor, evidence was given of certain assignments of moneys made to him by Gaynor prior to the alleged attaching order.

The County Court Judge held that the evidence of the admissions made by Gaynor was receivable, and for

moneys were the moneys of Marshall & Co. From this decision the attaching creditor appealed.

*Held*, that the County Court Judge erred in receiving evidence of the admissions of Gaynor: *Bertrand v. Heaman*, 11 Man. L. R. 205: the onus was upon the plaintiffs to establish a title to the moneys; having shown none by evidence binding upon the attaching creditor, the judgment should have been for the defendants in the issue. The appeal should be allowed and the judgment for the claimants in the issue, and the orders setting aside the attaching order and directing payment to the claimants, set aside.

But if the claimants desired, they might have a new trial of the issue upon payment of the costs of the former trial and of the appeal within a reasonable time to be fixed; otherwise, or in default of such payment, there should be judgment in the issue for the defendant, the primary creditor, and the claimants should be ordered to pay the costs of the appeal, leaving the costs of the interpleader proceedings and other matters for determination in the County Court under the order reserving them.

*Andrews*, for Marshall & Co.

*Metcalf* and *Sharpe*, for May.

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#### BERNHART v. McCUTCHEON.

*Replevin—Sale of Goods Act, 1896—Acceptance by buyer—Chattel mortgage—Validity of—Affidavit of bona fides—Change of possession.*

County Court appeal in an action of replevin as to 85 cords of wood. The plaintiff claimed under a chattel mortgage made to him by one Ryan, dated the 7th April, 1898, registered 14th April. The defendant alleged that Ryan, who was indebted to him for the price of a pair of horses sold to him, agreed in February, 1898, to deliver him 85 cords of wood at Molson station, to be piled between two telegraph poles then shown to him. The wood was piled and delivered by Ryan at the place indicated in March or early in April; the defendant went to Molson in the middle of April and saw the wood piled at the place indicated, when he made arrangements with the station agent to ship the wood to him at St.

Boniface; the trial Judge found that this was after the completion of the chattel mortgage.

The defendant contended that under the Sale of Act, 1896 s. 18, Rule 2, the sale was complete and the property passed when the wood was piled at Molson's and the defendant had notice thereof; and that under Rule 18, the property in the wood passed when it was piled at Molson, as it was then appropriated by Ryan to his use, and of sale to the defendant, with the latter's previous assent.

The trial Judge found that what might be considered the acceptance required to complete the sale and purchase of the property did not take place until after the plaintiff had acquired title to the wood by his chattel mortgage. Judgment was given in favour of the plaintiff; and the defendant appealed.

**Held**, that the appeal should be dismissed with costs.

The goods were not specific goods, they were retained and future goods, not even properly described the defendant had actually and formally accepted them at the time of his visit to Molson in the middle of April. He would certainly have been entitled to refuse acceptance until he did accept it the property had not passed. Looking at the wood and accepting it would have constituted the sale, had the wood been still the property of Ryan. Ryan had previously, by his chattel mortgage, transferred his property therein to the plaintiff.

Objection was taken to the validity of the chattel mortgage, because the consideration was not stated. It appeared that part of the consideration for Government duty on the timber cut, which the defendant was to pay, but had not yet paid when he made the mortgage, was of *bona fides*. The plaintiff in his evidence stated that he had made an arrangement with the Government agent, which was satisfactory to him, to pay the \$50, and there was no objection on the part of Ryan.

*Held*, that, in the absence of fraud, advantage could be taken of a statement technically incorrect, but substantially true, in the affidavit of *bona fides*, to avoid a mortgage. The fact that the plaintiff had assumed



amount of \$50 due for stumpage and had arranged with the Government to pay the same, was sufficient to render the affidavit of *bona fides* substantially correct: *Martin v. Sampson*, 24 A. R. 1.

*Per* KILLAM, J., dissenting:—The appeal should be allowed and judgment entered for the defendant. The trial Judge erred in treating acceptance by the buyer as a condition precedent to the passing of the property. The property passed to the defendant upon or before the delivery of the wood at the agreed place, irrespective of any acceptance by the defendant. By putting the wood where the defendant directed, with the intention of thereby delivering it to the defendant, Ryan divested himself of any possession, actual or constructive, and vested that possession in the defendant, as effectually as if the defendant had owned the land where the wood was placed, or had been present to accept delivery. It did not appear that Ryan retained any apparent control over the wood or possession of it. There was a sufficient change of possession to make the transaction valid as against the plaintiff.

*Culver*, Q.C., and *Dubuc*, for the plaintiff.

*Howell*, Q.C., and *Mathers*, for the defendant.

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[18TH FEBRUARY, 1899.]

### GLINES v. CROSS.

*Principal and agent—Land agent's commission—Sale effected by another agent—Value of services—Appeal from order reducing verdict—Reconsideration by County Court Judge—County Courts Act, R. S. M. c. 33; 59 V. c. 3, s. 2—Cross-appeal—Necessity for.*

County Court appeal. The plaintiffs sued to recover commission upon a sale of land alleged to have been effected by them for the defendant.

Judgment was at first given for the plaintiffs for \$375, the full amount claimed, but upon application under s. 308 of the County Courts Act, this amount was reduced by one-half. The plaintiffs appealed upon the grounds that the clause did not give power to make the reduction, and that they were entitled to the full amount.

The plaintiffs, who were land agents, were approached by a person desirous of purchasing a certain class of property. Having none for sale which suited him, they sought the defendant's authority to procure this person to purchase certain property belonging to the defendant, and asked a price. The defendant asked what the commission would be and named \$14,400 as the price. The plaintiffs introduced the proposed purchaser to the defendant, showed him the property, and otherwise solicited him to make a purchase. Subsequently the property was sold to the same person through another agent at \$14,000. The defendant had no authority to the plaintiffs to procure a purchaser at \$14,400, nor did he agree to pay them commission at the rate mentioned, or at any other rate, upon any less price.

*Held*, that the appeal should be dismissed with costs. As the plaintiffs did not procure a purchaser who would pay at \$14,400, they could not recover upon the only agreement that was made; at most the defendant was liable only for the value of the services actually performed by the plaintiffs towards accomplishing a sale. The defendant never procured the proposed purchaser to become a purchaser upon any terms. Under the circumstances the value should not be placed on the plaintiffs' services as named by the County Court Judge.

The objection to a re-consideration of his judgment by the Judge of the County Court, entirely failed. Section 33 of the County Courts Act, R. S. M. c. 33, authorizes a new trial of the judgment, and the reduction in amount was granted.

It was contended by the defendant that the plaintiffs were not entitled to any compensation, and he asked the court to set aside entirely the judgment for the plaintiffs, though he had not appealed.

*Held*, that this course was not now open; 59 V. 101.  
*McMeans*, for the plaintiffs.

*Wilson*, for the defendant.

## Supreme Court of Canada.

ONTARIO.]

[21ST NOVEMBER, 1898.

## MAKINS v. PIGGOTT.

*Negligence—Use of dangerous material—Evidence—Trespass.*

Work on the construction of a railway was going on near the unused part of a public cemetery, in connection with which were used detonating caps containing fulminate. M., a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick, when it exploded and injured his hand. On the trial of an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place the workmen would hurriedly place any explosives they might have in their possession under their tool-box, and then run away. It also was proved that caps of the same kind were kept in the tool box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require.

*Held*, reversing the judgment of the Court of Appeal, that, in the absence of evidence of circumstances leading to a different conclusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shown to have had the right to handle them; that it was incumbent on the defendants to exercise a high degree of caution to prevent them falling into the hands of

strangers; that the Act of M. in exploding the cap did not necessarily import want of due caution, and negligence contributed to the accident, the jury should so find; and that whether or not M. was a trespasser was also a question for the jury, who did not pass upon it.

*W. Nesbitt and Gauld*, for the appellant.

*Osler, Q.C.*, for the respondents.

## RAINVILLE v. GRAND TRUNK R. W. CO.

*Railways—Negligence—Fire caused by sparks from engine—Findings of fact—Evidence—Concurrent findings of Courts below.*

In an action against a railway company for damages as the consequence of plaintiff's property being destroyed by fire, alleged to be caused by sparks from an engine of the company, the jury found, though there was no direct evidence of how the fire occurred, that the company neglected to remove an accumulation of grass or rubbish on the premises opposite the plaintiff's property, which, in case of sparks or cinders, would be dangerous; that the fire was communicated from or by reason of a spark or cinder from an engine, and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to the plaintiff's property. The judgment of the trial Judge, 25 A. R. 625, 17 Occ. N. 379, was in favour of the plaintiff, and was affirmed by the Court of Appeal, 25 A. R. 242, 18 Occ. N. 379.

*Held*, following *Sénécal v. Central Vermont Railway Co.*, 26 S. C. R. 64, and *George Matthews Co. v. Bouchard*, 25 A. R. 580, that the jury having found that the accumulation of grass and rubbish along the railway property caused the damage, and that there was some evidence, and the finding having been affirmed by the trial Judge and Court of Appeal, it should not be disturbed by a second appellate Court.

*Osler, Q.C.*, for the appellants.

*M. K. Cowan*, for the respondent.

[14TH DECEMBER, 1898.]

## HARDY LUMBER CO. v. PICKEREL RIVER IMPROVEMENT COMPANY.

*Company—Action against—Forfeiture of charter—Estoppel—Compliance with statute—Res judicata—Tolls—Commissioner of Crown Lands.*

In an action against a river improvement company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, etc., for which tolls were claimed, were not placed on the properties mentioned in the letters patent of the company; that the company did not comply with the statutory requirement that the works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands, upon which the schedule of tolls were fixed; that the company, by its works and improvements, obstructed navigable waters, contrary to the provisions of the Timber Slide Companies' Act, and could not exact toll in respect of such works. By a consent judgment in a former action between the same parties, it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands, whose report was to be accepted in place of that provided for by the Timber Slide Companies' Act, and to be acted upon by the Commissioner in fixing the schedule of tolls.

*Held*, affirming the judgment of the Court of Appeal, that the above grounds of impeachment were covered by the consent judgment, and were *res judicata*.

*Held*, further, that, the plaintiffs, having treated the company as a corporation, using the works and paying the tolls fixed by the Commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.

By R. S. O. 1887 c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation, it should forfeit all its corporate and other powers "unless further time is granted by the county or counties, district or districts, in or

adjoining which the work is situate, or by the Comm of Public Works."

*Semble*, that the non-completion of the works within years would not, *ipso facto*, forfeit the charter, but afford grounds for proceedings by the Attorney-General to have a forfeiture declared.

Another ground of objection to the imposition was that the Commissioner, in acting on the report of the valuator appointed under the consent judgment, erroneously based the schedule of tolls upon the report as to expected value instead of as to actual value, and the statement of counsel asked that the schedule be set aside and a new scale fixed.

*Held*, that, under the statute, the schedule could be altered or varied by the Commissioner, and the Court would not interfere, especially as no application for relief had been made to the Commissioner.

*Kappele and J. Bicknell*, for the appellants.

*W. Cassels, Q.C.*, for the respondents.

BRITISH COLUMBIA.]

[21ST NOVEMBER 1901.]

### MAJOR v. McCRAVEY.

*Contract—Illegal consideration—Stifling criminal prosecution—Restoration of trust funds—Agreement to restore—Suspension of civil proceedings—Partnership—20 & 21 V. c. 54, s. 12 (Imp.)—Criminal Code.*

The Imperial Act 20 & 21 V. c. 54, s. 12, provides that "nothing in this Act contained, nor any proceeding taken in pursuance of any law or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen, or impede any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed; . . . and nothing in this Act contained shall affect or prejudice any agreement entered into or security given by, any trustee, having for its object the restoration or repayment of any trust property misappropriated.

*Held*, affirming the judgment of the Supreme Court of British Columbia, 5 Brit. Col. L. R. 571, that the class of trustees referred to in the Act were those guilty of misappropriation of property held upon express trusts.

*Semble*, that the section only covered agreements or securities given by the defaulting trustee himself.

*Quære*, whether the Imperial Act is in force in British Columbia.

If in force, it would not apply to a prosecution for an offence under s. 58 of the Larceny Act, R. S. C. c. 264.

An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 264, s. 58, which was not re-enacted by the Criminal Code, 1892.

*Held*, that the alleged criminal act, having been committed before the Code came into force, was not affected by its provisions, and the covenant was illegal at common law. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act.

*Christopher Robinson*, Q.C., for the appellant.

*Chrysler*, Q.C., for the respondent.

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[14TH DECEMBER, 1898.]

### POPE v. COLE.

*Contract—Rescission—Innocent misrepresentation—Common error—Sale of land—Failure of consideration.*

An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation.

But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration, a Court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims, whereby the purchaser

got nothing for his money, the contract was rescinded though the vendor acted in good faith, and the transaction was free from fraud.

Judgment of the Court below, 6 Brit. Col. L. R. affirmed.

*Clute*, Q.C., for the appellant.

*Travers Lewis and Hamilton*, for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

#### IN CHAMBERS.

[MACLENNAN, J.A., 8TH MARCH,

GREAT NORTH-WEST CENTRAL R. W. COMPANY  
STEVENS.

*Appeal—Leave—Refusal by Court below—Stay of proceedings—Special circumstances—Judicature Act, s. 77.*

Leave to appeal to the Court of Appeal from an order of a Divisional Court affirming an order of a Judge in Chambers, which set aside an order of a referee in Chambers whereby the proceedings in the action were stayed pending the determination of an action in England brought by the present defendants, and to which the present plaintiffs were defendants, was refused by a Judge of the Court of Appeal, where such leave had previously been refused by the Court whose decision was complained of, where there were no good grounds on which that decision could be supported, where none of the special circumstances existed which the Act of the Judicature Act makes essential, and there were no special reasons for treating the case as exceptional.

*W. M. Douglas*, for the applicants.

*E. D. Armour*, Q.C., for the plaintiffs.



## HIGH COURT OF JUSTICE.

[FERGUSON, ROSE, ROBERTSON, JJ., 4TH MARCH, 1899.

REGINA v. FOX.

*Discovery—Examination of parties—Penalty—Alien Labour Act—Canada Evidence Act, ss. 2, 5.*

An action brought in the High Court of Justice for Ontario, in the name of Her Majesty, to recover a penalty for a violation of the statute of Canada 60 & 61 V. c. 11, restricting the importation and employment of aliens, is an action to which the provisions of the Canada Evidence Act, 56 V. c. 31, apply, within the meaning of s. 2, which provides that the Act shall apply "to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf;" ROSE, J., expressing no opinion as to this.

In such an action, having regard to the provisions of s. 5 of that Act, as now found in 61 V. c. 53, the defendant can be examined for discovery before the trial; ROSE, J., dissenting as to this.

*F. E. Hodgins*, for the plaintiff.

*J. J. Warren*, for the defendants.

## HEWGILL v. CHADWICK.

*Writ of summons—Issue from non-existent Court—Judge—Clerk—Nullity—Amendment—Waiver—Complete defect.*

A document purporting to be a writ of summons stated on its face that it was "issued from the office of the deputy clerk of the District Court of the provisional district of Thunder Bay and Rainy River at Rat Portage, in and for said district," and was tested in the name of F. F., "Judge of our said Court at Port Arthur," the 14th April, 1898.

It is provided by s. 90 of R. S. O. c. 109 that when a provisional judicial district is composed of two territorial districts (as was the case here) the Lieutenant-Governor in

Council may by proclamation declare that the junior district shall be detached from the provisional district and erected into a separate provisional district.

By proclamation dated the 21st February, 1898, it was declared that on and after the 4th April then next, the district of Rainy River should be detached from Thunder Bay and erected into a separate district.

The writ was, in fact, issued by the person who was, before the 4th April, the deputy clerk of the District Court at Rat Portage, but at the time of the issue no Judge or officers had been appointed for the District Court of the new district.

The defendants entered a conditional appearance, pleadings were delivered entitled in the District Court of Rainy River, the defendants in theirs objecting to the jurisdiction, and the case came on for trial before the Judge of the District Court of Thunder Bay at Rat Portage, who, the defendants again objecting, directed all amendments to be made to get rid of the objections, and, after a trial with a jury, gave judgment for the plaintiff.

*Held*, on appeal, that the writ was a nullity and incapable of amendment so as to make it good; that the defect was such as could not be waived by the defendants; it was a complete defect; and the proceedings should be stayed *in toto*, and the plaintiff ordered to pay the defendants' costs from the beginning.

*D. L. McCarthy*, for the defendants.

*E. Taylour English*, for the plaintiff.

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## CITY OF TORONTO v. CANADIAN PACIFIC R. W. CO.

*Stay of proceedings—Action for rent—Pending reference as to title and other matters—Vendor and Purchaser Act—Scope of reference.*

The plaintiffs having agreed to lease to the defendants a certain property known as the "alternative site," for successive terms of fifty years, during all time then to come, at a fixed rental, an order was made, by consent, upon a petition by the defendants under the Vendor and Purchaser

Act, directing the plaintiffs to deliver to the petitioners an abstract of title of the property, "and that it be referred to J. S. C., referee; and that all matters as to time of delivery of the abstract, the sufficiency thereof, and all subsequent questions arising out of or connected with the title to the said site, and the carrying out of the said agreement respecting the making of title to and the conveying of the said alternative site, be from time to time determined by the said referee, including the costs of the said reference, subject to appeal."

Pursuant to this order, an abstract was carried into the referee's office, and the title was accepted by the defendants, who had before this been and since continued in possession of the property.

The terms of the lease not having been settled by the referee, and no rent having been paid by the defendants, while the reference was still pending, this action was brought to recover the rent of the property from the time at which it was agreed the first term should begin.

By s. 4 of the Vendor and Purchaser Act, R. S. O. c. 134, any question arising out of or connected with the contract, excepting a question affecting the existence or validity of the contract, may be the subject of adjudication.

*Held*, ROSE, J., dissenting, that the order directed a reference of all questions and matters arising out of the agreement and the carrying of them into effect; that the settlement and payment of the rent was one of the matters virtually, if not expressly, embraced in the reference; that it was a matter in respect of which an order might be made under s. 4; that the plaintiffs could not, without the leave of the Court, single out one of the matters so pending and bring and sustain a separate action in regard to it; and, therefore, this action should be perpetually stayed.

*Frank v. Busnett*, 2 My. & K. 618, *Bell v. O'Reilly*, 2 Sch. & Lef. 430, and *Prothero v. Phelps*, 25 L. J. Ch. 105, referred to.

*Per* ROSE, J., that the referee had power under the order only to determine the question of title and the questions respecting the form and execution of the lease; and the

enforcement of the payment of the rent and of the other provisions must be by action; but it would not be convenient to allow the action to proceed until the lease should be settled; and it should, therefore, be stayed until further order.

*Robinson, Q.C., and Fullerton, Q.C., for the plaintiffs.*

*E. D. Armour, Q.C., and Angus MacMurchy, for the defendants.*

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[BOYD, C., FERGUSON, J., ROBERTSON, J., 8TH FEBRUARY, 1899.]

ROGERS v. CARROLL,

*Chattel mortgage—Affidavit of bona fides—Variation from statutory form—Liability of indorser—Payment of notes by mortgagee—Change in form of security—Execution creditors—Priorities—Assignment for benefit of creditors—Preference—Presumption—Rebuttal.*

The affidavit of *bona fides* made by the mortgagee in respect of a chattel mortgage given to secure the mortgagee against liability in respect of his indorsement of certain promissory notes for the mortgagor, employed the expression, "and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage," instead of the statutory words, "and truly states the extent of the liability intended to be created and covered by such mortgage." It also contained this clause, "and for the express purpose of securing me, the said mortgagee therein named, against the payment of the amount of such notes indorsing liability for the said mortgagor," instead of the words, "and for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagor."

*Held*, that the mortgage was not void as against creditors by reason of these variations from the statutory form.

*Boldrick v. Ryan*, 17 A. R. 253, distinguished.

The mortgagee, having paid the notes during the currency of the mortgage, before the expiration of a year took and filed a new mortgage upon the same goods for the amount paid by him and interest, changing the form of the instrument so as to make it appropriate to an actual advance of

money, but not reciting the prior mortgage or the payment. Within sixty days of this, the mortgagor made an assignment for the benefit of creditors.

*Held*, that executions in the sheriff's hands before the second mortgage was filed, but subsequent to the first mortgage, did not gain priority over the second; and the statutory presumption that the latter was made with intent to prefer was rebutted by the circumstances.

*George Kerr*, for the plaintiff.

*E. D. Armour*, Q.C., and *W. B. Carroll*, for the defendants.

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[STREET, J., 2ND MARCH, 1899.

*In re* SOLICITOR.

*Solicitor—Taxation of costs against client—Scale of costs—Ascertainment of amount—Solicitor's knowledge of facts.*

A deposit receipt for \$180 was issued by a chartered bank in 1877 in favour of a person who died in 1879. After the death, the sister of the deceased, who claimed to be the transferee of the deposit receipt, presented it to the bank, with a signature purporting to be that of the deceased indorsed upon it. Upon the surrender of this document, the bank issued a new receipt for the same amount, also in favour of the deceased, and delivered it to the sister, who supposed it was in her own name. The bank afterwards, and before any notice of a claim on behalf of the administratrix of the deceased's estate, paid the sister the amount of the second deposit receipt, upon being indemnified.

The administratrix in 1893 brought an action against the bank, wherein the writ of summons was indorsed with a claim for \$355.60, being the amount of money in the hands of the bank belonging to her, or for an order for the delivery to the plaintiff of the second deposit receipt, or for an order declaring that the bank held the receipt and the moneys secured thereby as trustee for her. At the time of the issue of the writ the knowledge of the administratrix and of her solicitor was confined to the fact that the bank had issued a

deposit receipt in favour of the deceased for \$180 after she had been dead for several months, and that the sister had received the amount of it. The real claim, as developed at the trial, was upon the first deposit receipt, and the material contention was whether the indorsement was genuine or forged. The action was dismissed.

*Held*, that the solicitor who brought the action on behalf of the administratrix was entitled as against his client to costs on the scale of the High Court, as the fact that the real claim was upon the earlier receipt only was not known to either when the action was begun, and there was sufficient room for doubt whether a claim could be ascertained, after the death of the creditor, by the signature of the debtor, to warrant the bringing of the action in the High Court; and the plaintiff would probably have received a certificate for costs on the High Court scale, had she succeeded in the action.

*W. E. Middleton*, for the client.

*F. A. Anglin*, for the solicitor.

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## IN CHAMBERS.

[MEREDITH, C.J., 8TH MARCH, 1899.]

*In re* KING.

*Dower—Conveyance of land, free from—Application to dispense with concurrence of wife—R. S. O. c. 164, s. 12—Construction of—Ex parte application—Notice—Advertisement.*

An order under s. 12 of the Dower Act, R. S. O. c. 164, dispensing with the convenience of a land owner's wife for the purpose of barring her dower, is made by the Judge as *persona designata*, and is not subject to appeal. Great care should, therefore, be taken to ascertain that the case made by an applicant comes clearly within its provisions, and an order should not be made *ex parte* unless under very exceptional, if under any, circumstances.

The words "where the wife of an owner of land has been living apart from him for two years under such circumstances as by law disentitle her to alimony," do not require more to be shown than that the wife has been living apart from her husband for two years, and that the circumstances under which she has been living apart from him are such that she is not entitled to claim alimony.

Leave given to serve notice on a missing wife by advertisement in a newspaper if further search for her should not prove successful.

*J. W. Elliot*, for the applicant.

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### PALMER v. SCOTT.

*Arrest—Intent to defraud creditors—Temporary absence.*

Where the defendant's place of residence was in Ontario, and he was quitting the Province for a temporary purpose, leaving his wife and family behind, and intending to return before the end of the year, and it appeared that he had no property, he was discharged from custody under an order in the nature of a *ca. re.*, made pursuant to s. 1 of R. S. O. c. 80, on the ground that it could not be said that he was going with intent to defraud creditors.

*S. B. Woods*, for the plaintiff.

*F. C. Cooke*, for the defendant.

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[STREET, J., 3RD MARCH, 1899.]

### DENISON v. WOODS.

*Costs—Taxation—Counsel fee on reference for trial—Fee advising on evidence—Appeal and cross-appeal from report—Copy of evidence.*

An action by an architect to recover \$600 for professional services was by consent referred for trial to an official referee, who reported that the plaintiff should recover \$397. The defendant had before action tendered \$325, and had paid that amount into Court with his defence. The defendant appealed from the report, and the plaintiff also appealed,

but not until after the defendant's appeal had been set down. Both appeals were dismissed with costs. A further appeal by the defendant to the Court of Appeal was also dismissed.

*Held*, upon appeal from taxation of costs, that the plaintiff was entitled to tax a counsel fee upon the trial before the referee, the amount of which would not be reviewed, and also a fee for counsel advising on evidence.

*Re Robinson*, 16 P. R. 423, distinguished.

*Held*, also, that the defendant was not entitled to tax, as part of his costs of the plaintiff's appeal from the report, the amount paid for a copy of the evidence taken before the referee, which was required by the defendant for his own appeal.

*F. A. Anglin*, for the defendant.

*W. E. Middleton*, for the plaintiff.

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## NOVA SCOTIA.

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In the Supreme Court.

IN CHAMBERS.

[McDONALD, C.J., 24TH FEBRUARY, 1899.]

CROSS v. HEISLER.

*Order—Motion to vary—Conformity with order as pronounced.*

Three solicitors representing different interests were present in Chambers when a consent order was pronounced. One of the three, on a subsequent day, moved to vary the order as issued so as to make it conform to the Judge's decision as to costs. The amendment suggested did not affect the interest of one of the two other parties, but did affect that of the third, by whom the order had been taken out.



No two of the solicitors agreed as to the decision, and the presiding Judge did not remember what it was.

*Held*, that, under these circumstances, the order as issued must stand, and the application be dismissed.

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GILLIES v. GAVAZA.

*Writ of summons—Substituted service.*

Upon an application for leave to effect substituted service of the writ of summons upon the defendant, a married woman, who was shown to be at home, but avoiding service, an order was made authorizing service by sending a copy of the writ and order by post to the defendant, and by handing copies to her husband with a request to deliver to her.

*Roscoe*, Q.C., for the plaintiff.

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COLLISHAW v. ACADIA PULP CO.

*Particulars—Action for conversion of chattel—Title.*

In an action for the conversion of a portable mill, the plaintiff sued as administrator of the estate of the former owner. The statement of claim alleged that the intestate being owner of the mill, the defendant wrongfully converted it, etc. The defendant moved for particulars of the plaintiff's title to the mill.

*Held*, that in an action for the recovery of personal property, such particulars would be merely anticipation of the reply. The rule as to pleading title when out of possession and claiming real property cannot be extended to cover personal property.

Motion dismissed with costs.

*H. Mellish*, for the plaintiff.

*H. T. Jones*, for the defendant.

## MURRAY v. KAYE.

*Arrest—Affidavit to hold to bail—Defect—Writ of summons—No indorsement for costs—Effect of—Stay of proceedings pending appeal.*

An application by the defendant to set aside the writ of summons, order for arrest, and bail bond, on the grounds: (1) That the writ was not specially indorsed with the claim for costs as required by Order III., Rule 6, of the Nova Scotia Judicature Act, the claim being a liquidated demand for \$391, money had and received; (2) that the affidavit upon which the order was granted did not state that any writ had been issued or action begun.

*Held*, that these defects were not sufficient to justify the relief claimed.

*Semble*, that the omission of the indorsement for costs would cause the loss of the plaintiff's costs, in the event of his success in the action: Chit. Arch. p. 223.

Application dismissed with costs, fixed at \$10. Stay of proceedings pending appeal refused, the matter not being at all doubtful.

*W. H. Fullerton*, for the plaintiff.

*E. P. Allison*, for the defendant.

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[MEAGHER, J., 7TH MARCH, 1899.]

## HAWKINS v. SNOW.

*Judgment debtor—Examination of—Application to examine other persons in aid of execution.*

An order had been granted in Chambers, under Order 40. Rule 44, of the Nova Scotia Judicature Act, for the examination of the defendant, against whom a judgment had been obtained in the action, in aid of execution. The judgment debtor had been examined before a special commissioner, but it was found that he could not give, because he had not in his possession, certain information which the judgment creditor sought. He stated on examination that certain officers of a corporation of which he was a servant would be able to give the information. This was an application on behalf

of the judgment creditor, under the same Rule, for leave to summon these officers before the commissioner. The applicant based his case on the words "and the Court or a Judge may make an order for the attendance and the examination of such debtor, or of any other person," etc.

*Joseph A. Chisholm*, for the applicant.

*William F. O'Connor*, contra.

MEAGHER, J.—It is very clear indeed that I have no power to grant this application. The cases of *Irwell v. Eden*, 18 Q. B. D. 588, *Hood-Barrs v. Herriott*, [1896] 2 Q. B. 338, and *Hamilton v. Stewiacke R. W. Co.*—*In re Dickie*, 30 N. S. Reps. at p. 99, are opposed to the view that the power to order what is sought exists. If it were otherwise, it would lead to a long and tedious examination of persons who had no interest or concern whatever in the inquiry, causing them much inconvenience, and leading more or less to a disclosure of their private affairs. Such a course would be unreasonable and unfair to third persons.

Application refused with costs, to be set off against the judgment debt.

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## MANITOBA.

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### In the Queen's Bench.

[KILLAM, J, 9TH MARCH, 1899.]

#### ORTON v. BRETT.

*Promissory note—Action on lost note—Indemnity—Sufficiency of—Practice.*

The plaintiff sued, previous to the Queen's Bench Act, 1895, on a promissory note made by the defendant. Before the note became due it was lost, and the plaintiff delivered to the defendant a bond of indemnity executed by the plaintiff and her husband.

The defendant pleaded that the note was lost, and the plaintiff moved to strike that plea out.

*Held*, that the indemnity tendered was insufficient. It was upon the expressed condition that a new note should be given, which was not done. Instead of proceeding to compel the giving of a new note, the plaintiff sued upon the old one.

The bond of the plaintiff alone should not be accepted. The sufficiency of the security was denied, and there was no affidavit of justification by the plaintiff's husband, who was the only surety.

The custom of Courts of equity in requiring indemnity as a condition of enforcing payment of lost negotiable bills arose out of the custom of bankers. See *Glynn v. Bank of England*, 2 Ves. 38; *Mayor v. Johnson*, 3 Camp. 324; *Redmayne v. Burton*, 2 L. T. N. S. 324.

It could be left to the Master to settle the security. Although the statute says that is to be "to the satisfaction of the Court or a Judge," the Court has to be satisfied through some person, and this person may be the officer usually intrusted with the consideration of such questions.

Ordered that upon the plaintiff giving an indemnity to the satisfaction of the Master against the claims of any other person upon the note sued on, the defendant should not set up further in this action the loss of such note, and that the costs of the plea of loss and incident thereto and so much of this application as related to barring the defendant from setting up such loss and of settling and obtaining such indemnity should be costs in the cause to the defendant in any event of the cause.

*McMeans*, for the plaintiff.

*Hough*, Q.C., for the defendant.

## NORTH-WEST TERRITORIES

## In the Supreme Court.

[ROULEAU, J., 16TH FEBRUARY, 1899.]

*In re* BANFF PROVINCIAL ELECTION.

*Parliamentary elections—Territories Elections Ordinance—New poll held in certain polling-divisions—Statements of voters—Powers of Court of Revision—Powers of Court of Appeal—Right of non-resident scrutineer to vote—"Resided," meaning of.*

An election under the Territories Election Ordinance was held in the Banff electoral district on the 4th November, 1898.

On the hearing of an application for a recount, ROULEAU, J., ordered new polls to be held in the polling divisions of Laggan and North Canmore, pursuant to s. 106.

New polls were accordingly held on the 14th January, 1899, in these two polling divisions.

According to the Ordinance, when a voter is challenged, he is required to sign a statement in the form J1, J2, or J3, in the schedule. Either of the candidates may then serve the voter with a summons to appear before the Court of Revision, whose duty it is to inquire whether the statement signed by the voter is true or not; if true, the vote is to be allowed; if not true in every particular, the vote is to be disallowed.

By s. 39 (2), "except as hereinafter provided, an elector may only vote at the polling place of the polling division in which he is a resident at the time of voting."

By s. 50, "any deputy returning officer . . . agent, or scrutineer, who is resident in a polling division other than the one in which he is stationed on the polling day, shall be

permitted to vote at the polling station at which he is so stationed. . . . after signing statement J3 in the schedule, etc., etc.

Statement J3 is as follows:—

“I, A.B., hereby state that I am a male British subject . . . . of the full age of twenty-one years; that I have resided in the North-West Territories for at least the twelve months, and in this electoral district for at least the three months, immediately preceding the present time, and that I am now residing in polling division number        of this electoral district; that I have not voted at this election, either at this or at any other polling place; and that I am acting as deputy returning officer (or as scrutiner for ———) at this polling station.”

By s. 111, all the provisions of the Ordinance relating to election proceedings “shall, *mutatis mutandis*, and in so far as they are applicable, apply to a vote held in any polling division under the provision of section 109 hereof,” i.e., to a new poll when ordered by the Judge on a recount.

At Laggan polling division scrutineers who were resident in other polling divisions, acting for the candidate Dr. Butt, voted; and their votes were challenged before the Court of Revision by the candidate Mr. Sifton.

*Lang's case*:—On the ground that he had been deputy returning officer in another polling division, on the 4th November, 1898, and could not have possibly voted in Laggan on that day.

*Kirkendale's case*:—On the ground that on the 4th November, 1898, he was resident and entitled to vote in another polling division, and could not possibly have voted at Laggan.

*Pucock's case*:—On the ground that he was absent from the electoral district on the 4th November, 1898, and could not possibly have voted at Laggan.

The Court of Revision disallowed all these votes, and Dr. Butt appealed.

The appeal was heard by ROULEAU, J., sitting in appeal from the Court of Revision under the Territories Election Ordinance, on the 6th February, 1899.

*C. C. McCaul*, Q.C., for the applicant. By s. 67, the inquiry before the Court of Revision is limited to whether the statement made by the voter is true or false. The Court exceeded its powers in determining that s. 50 did not apply in its integrity to the new poll, under s. 111. The Judge in appeal has only the same powers as the Court of Revision.

*A. L. Sifton*, in person, *contra*. Section 111 only applies *mutatis mutandis*. As new polls were being held simultaneously in North Canmore and Laggan, s. 50 only applies to those two polling divisions, i.e., a resident of North Canmore might vote as scrutineer at Laggan, and *vice versa*; but not a resident of any other polling division not re-opened. The Court of Revision is to inquire into the "rightfulness" of the vote.

Judgment was delivered on the 16th February, 1899.

ROULEAU, J.—Appeals are submitted to me from the Court of Revision resulting from the votes cast on the 14th January last in the two polling divisions, No. 1, Laggan, and No. 4, North Canmore, opened after the election of November last, because the conduct of the polls in said polling divisions had not been in accordance with the provisions of the Elections Ordinance.

Before referring to each appeal in particular, I shall decide certain questions of law which have been submitted to me during the hearing of the appeals.

The first and most important question to consider is the scope of these appeals.

The scope of these appeals is determined by s. 91, and s.-s. 2, of the Elections Ordinance. Section 91 reads: The Judge shall hear such evidence as shall be adduced, and may affirm or reverse the decision of the Court of Revision, or of the returning officer, as the case may be, with respect to any such vote, and shall render such judgment with respect to

the validity of such vote as such Court or returning officer ought to have rendered.

Sub-section 2 gives the powers of the Judge in these words: "The Judge sitting in appeal shall be deemed a Court, and shall have and exercise all the powers and authorities by this Ordinance conferred upon the Court of Revision."

It seems to me that this language is simple and clear; my powers are the same as those conferred by law upon the Court of Revision.

Section 67 determines the question which can be inquired into by the said Court in the following words: "The question to be determined at any inquiry by the Court of Revision hereby constituted shall be whether any statement made on polling day under the provisions of this Ordinance by the voter whose vote is the subject of the inquiry, is false, in whole or in part, and if false in part, in what respect is it so false." Sub-section 2 goes on to say that what will be the judgment of the Court according to the proof given: "If it is proved to the satisfaction of the Court that any voter whose vote is the subject of inquiry has made any such statement which is false, in whole or in part, the vote of such voter shall be disallowed; but if it be proved to the satisfaction of such Court that every such statement so made by such voter is altogether true, such vote shall be allowed."

Therefore my inquiry in these appeals shall be confined to the veracity of the statements signed by the voters, when their votes were objected to, and not to the validity or invalidity of their votes under any other statement which they might have signed. It is not a matter of fancy; it is a matter of jurisdiction. It was contended during the argument that I had jurisdiction to inquire into the validity of the votes of a number of scrutineers who were not residents in either of the polling divisions where the polls were held. I am sorry to say that, at this stage of the proceedings, I have not. I must take the statement of record, and no other. If the deputy returning officers had the voters sign the wrong statement, I cannot remedy it in the course of these appeals.



There is no doubt in my mind that there is a deficiency in the law in that respect. Whether these scrutineers had a right to vote or not, is a very serious question, but I do not see any section in the Ordinance which would entitle me to decide it, either in these appeals, or during the recount, except under the Controverted Elections Ordinance.

The Court of Revision for the polling divisions of North Canmore and Laggan allowed certain votes on the ground of the voter being *resident*, and disallowed others on the ground that the voter was *non-resident*.

Appeals were taken by both candidates and argued by the same counsel, on the 6th February, 1899.

Judgment was delivered on the 16th February, 1899.

ROULEAU, J.—Before discussing the facts of the individual cases before me, I propose to lay down certain general principles which will guide me in determining the “residence” of the several voters whose right to vote is in question.

Section 39 gives the qualification of voters, and among other things it says: “The persons qualified to vote . . . shall be male British subjects . . . who have resided in the North-West Territories for at least the twelve months, and in the electoral district for at least the three months, respectively immediately preceding the time of voting.”

It is to be noted that the Elections Ordinance does not require that a voter should be domiciled or should have his home in the North-West Territories, but should have resided therein for a certain time. It is important therefore to know the exact meaning of the word “residence.”

According to the best authorities I can find, “residence,” means a person’s habitual physical presence in a place or country, which may or may not be his home. So, according to this definition, a man may have his home in Ontario and be a resident of Canmore or Laggan. But in that definition the word “habitual” must not be given too restricted a sense. Dicey on Conflict of Laws, p. 80, says: “The word ‘habitual’ in the definition of residence, does not mean presence in a place either for a long or short time, but the presence there

for the greater part of the period, whatever that period may be (whether 10 years or 10 days) referred to in each particular case."

As an illustration of the above definition, I may cite the following example: A. has resided in Calgary for two years. He goes away on business or a trip of pleasure for four months; his residence is still at Calgary; and if an election were to take place the day after he came back, he would have a vote in Calgary, according to my reading of the Elections Ordinance.

[The learned Judge then disposed of the individual cases upon the facts of each case.]

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## Supreme Court of Canada.

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ONTARIO.]

[17TH MARCH, 1899.

### FARQUHARSON v. IMPERIAL OIL CO.

*Appeal—Leave to appeal per saltum—Appeal from order in Chambers—  
Highest court of final resort in Province—Judgment of Divisional Court  
—Appeal direct from.*

There is no appeal to the Court from an order of a Judge in Chambers granting leave to appeal.

*Ex p. Stephenson*, [1892] 1 Q. B. 394, followed.

*Per* GWYNNE, J., in Chambers.—In cases in which the Ontario Legislature has enacted that a litigant who takes his case to a Divisional Court for review of the judgment at the trial has no further appeal to the Court of Appeal, the judgment of the Divisional Court is the judgment of the highest Court of final resort in the Province, within the meaning of R. S. C. c. 135, s. 24 (a), and there is a right of appeal from such judgment direct to the Supreme Court.

*Held*, also, *per* GWYNNE, J., that the judgment of the Divisional Court in this case, 29 O. R. 206, 18 Occ. N. 135, deprived the appellants for all time in a very essential degree of the use of a stream for floating down timber, such being the effect of the construction of a dam across the stream which the judgment pronounced lawful, and it was, therefore, a proper case for leave to appeal *per saltum*, if such leave was necessary; and he made an order granting such leave.

On appeal from his whole judgment, the Court did not pronounce on the first question, and held that it had no jurisdiction to review the order granting leave.

*Osler*, Q.C., for the appellants.

*Aylesworth*, Q.C., for the respondent.

QUEBEC.]

[14TH DECEMBER, 1898.]

TOWNSHIP OF ASCOT v. COUNTY OF COMPTON.

TOWNSHIP OF LENNOXVILLE v. COUNTY OF  
COMPTON.

*Municipal corporations—By-law—Railway aid—Subscription for shares—  
Debentures—Division of county—Erection of new separate municipal-  
ities—34 V. c. 30 (Q.)—Arts. 78, 164, 939, Q. Mun. Code—39 V. c. 50 (Q.)  
—Assessment—Sale of shares at discount—Action en reddition de comptes  
—Trustees—Debtor and creditor.*

An action *en reddition de comptes* does not lie against a trustee invested with the administration of a fund until such administration is complete and has terminated.

The relation existing between a county corporation and the local municipalities of which it is composed in relation to money by-laws, is not that of an agent or trustee, but the county corporation is the creditor and the several local corporations are its debtors for the amount of taxes to be assessed upon their ratepayers respectively.

Where several local municipalities formerly constituting part of a county municipality have been detached therefrom and erected into separate corporations, they remain in the same position in regard to subsisting money by-laws as they were before the division, having no further rights or obligations than if they had never been separated, and they cannot, either conjointly or individually, institute actions against such county corporation to compel the rendering of special accounts of the administration of funds realized upon the sale of county debentures issued before the separation, but their proper method of obtaining the necessary information is merely that provided by Art. 164 of the Municipal Code, and through the other facilities thereby afforded local municipalities in such affairs.

Judgment of the Court below affirmed.

*Lafleur* and *Hurd*, for the appellants.

*Brown*, Q.C., for the respondents.

## COMMON v. McARTHUR.

*Company—Irregular organisation—Subscription for shares—Withdrawal—Surrender—Forfeiture—Duty of directors—Powers—Cancellation of stock—Ultra vires—Companies Act—Winding-up Act—Contributories—Pleading—Construction of statute.*

After the issue of an order for the winding-up of a joint stock company incorporated under the Companies Act, a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company; under the Act such grounds can be taken only upon direct proceedings at the instance of the Attorney-General.

The powers given the directors of a joint stock company under the provisions of the Companies Act, as to forfeiture of shares for non-payment of calls, is intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company, and cannot be employed for the benefit of the shareholder.

Judgment of the Court below reversed.

*Buchan and B. C. Smith*, for the appellant.

*J. L. Morris*, Q.C., and *Beique*, Q.C., for the respondent.

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MANITOBA.]

[15TH MARCH, 1899.]

## DAY v. RUTLEDGE.

*Mortgage—Purchase of land at tax sale by mortgagor's wife—Fraudulent scheme—Foreclosure—Liability of assignee of purchaser at tax sale—Notice—Pleading.*

In 1888 R. gave a mortgage on his land to D., his wife joining to bar her dower. In May, 1893, the mortgaged lands were sold for municipal taxes, and purchased by the wife of R., who received the tax sale certificate. Later in 1893 a new mortgage on the lands was executed by R. and his wife in substitution of the former, the fact of the sale for taxes not being disclosed to the mortgagee. Subsequently the tax sale certificate was assigned to L., who, in 1895, received a tax sale deed of the land. An action for foreclosure was brought upon the mortgage by the mortgagee against R., his wife, and L. The plaintiff alleged that the purchase

at the tax sale was in pursuance of a scheme by the defendants to cut out the mortgage, and asked for a declaration that L. held the land in trust for the other defendants. The Court of Queen's Bench exonerated L. from the charge of fraud, but held that he should have pleaded purchase for value without notice: 12 Man. L. R. 290, 18 Occ. N. 315.

*Held*, affirming such judgment, that L. should have pleaded such defence; that there were circumstances amounting to constructive notice that should have put him on inquiry; and that the purchase at the tax sale was really for the benefit of the mortgagor.

*Held*, per GWYNNE, J., concurring in the opinion of DUBUC, J., at the trial, 18 Occ. N. 150, that the whole scheme was a contrivance to commit a fraud on the mortgagee.

*Ewart*, Q.C.; for the appellant.

*S. H. Blake*, Q.C., and *E. H. Smythe*, Q.C., for the respondent.

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N. W. T.]

[14TH MARCH, 1899.

### EASTMAN v. RICHARDS.

*Landlord and tenant—Duration of tenancy—Overholding tenant—Notice to quit.*

R. rented a store from E. for a term of eleven months, agreeing to pay rent at the rate of \$400 a year. After the term expired he remained in possession, without any new agreement, for ten months, paying the rent reserved monthly during the whole period, and then gave a month's notice, and abandoned possession. E., claiming that the tenancy after the term expired was from year to year, brought an action for rent for the two months subsequent to the abandonment.

*Held*, affirming the judgment of the Supreme Court of the North-West Territories, that the tenancy after the eleven months expired was only from month to month, and the action was properly dismissed by the Court below.

*Latchford*, for the appellant.

*Lougheed*, Q.C., for the respondent.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

DIVISIONAL COURT.]

[14TH MARCH, 1899.

FRASER v. LONDON STREET R. W. CO.

*Evidence—Appeal—Motion for leave to adduce further evidence—Action for bodily injuries—Excessive damages—Examination by surgeon—Rules 462, 498.*

In an action for damages for bodily injuries received by the plaintiff owing to alleged negligence of the defendants, the plaintiff recovered a verdict for \$3,300, which a Divisional Court reduced to \$2,000, if the plaintiff would consent, and in the alternative directed a new trial: 29 O. R. 411, 18 Occ. N. 259. The plaintiff accepted the reduction, but the defendants declined to do so, insisting that the damages, even as reduced, were excessive, and appealed to the Court of Appeal. Their appeal being set down, they moved for leave to give further evidence to show that the damages were excessive, and, in order to show that the plaintiff had recovered his health and that the injury he sustained had not been so serious or of so permanent a character as was anticipated at the trial, they asked that he might be ordered to submit to a bodily examination by a surgeon, under Rule 462.

*Semble*, that the examination under Rule 462 is for discovery, and is not evidence of the character contemplated by Rule 498 (1).

*Held*, that the only object in getting in the proposed evidence was to reduce the damages still further, or to obtain a new trial, and it was not reasonable, that the defendants, having refused the relief the Court below offered, should be allowed to introduce this evidence on the appeal. They did not make out a sufficiently clear case for the admission of

the evidence. It opened nothing but a prospect of conflicting statements and opinions as to the present state of the plaintiff's health and the prospects of his ultimate recovery. From the very nature of the case, it must be always a most difficult task to interfere, by reason of matters arising *ex post facto*, with an assessment of damages in respect of personal injuries. It might be done in rare cases, but it was necessary to show some clear definite fact pointing to an over-assessment such as existed in *Sibbald v. Grand Trunk R. W. Co.*, 19 O. R. 164, or in *Kramer v. Waymark*, L. R. 1 Ex. 241.

The motion was therefore refused.

*H. D. Gamble*, for the motion.

*Aylesworth*, Q.C., contra.

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Boyd, C.]

MORROW v. LANCASHIRE INS. CO. OF ENGLAND.

*Fire insurance—Policy — Assignment — Cancellation — Mortgagee — Subsequent insurance—Double insurance—Proofs of loss.*

A policy of insurance covering the buildings on the mortgaged property and their contents, assigned by the mortgagor to the mortgagees as collateral security, cannot be cancelled by the insurance company at the request of the mortgagees, without notice to the mortgagor.

Insurance effected by the mortgagees after the attempted cancellation does not affect the mortgagor's right of recovery on the policy effected by him.

Where the insurers repudiate liability on a policy, they cannot object that proofs of loss have not been furnished.

Judgment of BOYD, C., 29 O. R. 377, 18 Occ. N. 220, affirmed.

*W. M. Douglas* and *C. S. MacInnes*, for the appellants.

*George Wilkie*, for the respondent.



ARMOUR, C.J.]

GOOD v. TORONTO, HAMILTON, AND BUFFALO R. W.  
CO.

*Contract—Conditions—Reference to engineer—Description in contract.*

The rule that a contractor is bound by a condition in his contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as, and is supposed by the contractor to be, the engineer of a third person.

Judgment of ARMOUR, C.J., affirmed.

Osler, Q.C., and D'Arcy Tate, for the appellants.

Aylesworth, Q.C., and S. F. Washington, for the respondents.

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[16TH MARCH, 1899.]

GORDON v. UNION BANK OF CANADA.

*Bankruptcy and insolvency—Assignments and preferences—Payment of money—Cheque.*

A trader, in insolvent circumstances, sold his stock-in-trade in good faith, and directed the purchaser to pay as part of the purchase money a debt due by the trader to his bankers, who held, as collateral security, a chattel mortgage on the stock-in-trade. The purchaser had an account with the same bankers, and gave to them a cheque on themselves for the amount of their claim, there being funds at his credit to meet the cheque.

*Held*, that this was a payment of money to a creditor and not a realization of a security, and that the bankers were not liable, in a creditors' action, to account for the amount received.

*Davidson v. Fraser*, 23 A. R. 439, 16 Occ. N. 213, 28 S. C. R. 272, distinguished, on the ground that the cheque never was the property of, or under the control of, the insolvent.

Judgment of ARMOUR, C.J., affirmed.

*Watson*, Q.C., and *A. C. MacMaster*, for the appellants.

*D. W. Saunders*, for the respondents.

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FALCONBRIDGE, J.]

[14TH MARCH, 1899.

JAMIESON v. LONDON AND CANADIAN L. & A. CO.

*Landlord and tenant—Lease—Assignment—Mortgage—Discharge.*

It having been held in a former action between the parties, 27 S. C. R. 435, 17 Occ. N. 320, that the defendants were, under the assignment of lease by way of mortgage there in question, assignees of the term and liable on the covenants in the lease contained, it was now

*Held*, that they were entitled to execute a statutory discharge of the mortgage and thus put an end to their liability, the assignment to them having been made, to the lessor's knowledge, for a limited purpose.

Judgment of FALCONBRIDGE, J., reversed.

*Robinson*, Q.C., and *Arnoldi*, Q.C., for the appellants.

*Aylesworth*, Q.C., and *W. H. Irving*, for the respondent.

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STREET, J.]

STRATFORD GAS CO. v. CITY OF STRATFORD.

*Contract—Performance—Impossibility—Damages.*

No action lies for the non-performance of a contract which on its face is impossible of performance.

Where, therefore, a contract was made for the electric lighting of a city for a named number of nights before a fixed date at a fixed rate per light per night, and there were not as many as the named number of nights before that date, the city corporation was held not liable to pay at the contract rate for the difference in number between the named number and the actual number.

Judgment of STREET, J., affirmed.

*Woods*, Q.C., for the appellants.

*Idington*, Q.C., for the respondents.

## DRAINAGE REFEREE.]

## YOUNG v. TUCKER.

*Water and watercourses—Drainage—Cultivation of land.*

While the owner of land has an undoubted right to drain it in the ordinary course of husbandry, he must take care that any water collected by his drains is carried to a sufficient outlet, and if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into it, he is liable in damages to a person whose land is flooded by water overflowing from that pond.

Judgment of the Drainage Referee reversed.

*Aylesworth, Q.C., and F. W. Kittermaster, for the appellants.*

*A. Weir, for the respondent.*

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## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., 21ST FEBRUARY, 1899.]

## MEEHAN v. PEARS.

*Assessment and taxes—Tenant paying taxes—Previous assessment against himself as owner—R. S. O. c. 224, s. 26—"Taxes recoverable from a previous occupant."*

The defendant and his father and brother were jointly assessed as owners of certain premises for the year 1897, although the defendant had no interest in them. He subsequently became tenant to the plaintiff, a mortgagee in possession, under a lease for a term of five years from the 1st April, 1898. After he entered into possession he paid the taxes, under pressure of a warrant, to a bailiff, and deducted the amount from his rent.

In an action for the balance of the rent by the lessor:—

*Held*, that the taxes were not taxes recoverable from a previous occupant within the meaning of s. 26 of the Assessment Act, R. S. O. c. 224, and that it never was intended that he should be at liberty to deduct from his rent and compel his landlord to pay taxes for which he was himself primarily

liable, and even if his assessment was improper, not having availed himself of his right of appeal, the assessment became conclusive as between him and the municipality and recoverable from him, and the fact of his afterwards becoming a tenant would not alter his rights.

*Raney*, for the defendant.

*W. H. Irving*, for the plaintiff.

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### WRIGHT v. McCABE.

*Parent and child—Agreement by father as to the support and maintenance of his children—Evidence to vary—Previous conversations—Public policy—Moral obligation.*

The plaintiff, on the death of a daughter, executed an agreement with the defendant, the daughter's husband, whereby she promised to rear, maintain, and educate his two children, and to make no demand on him to aid in their support, in consideration of his renouncing all his rights as a father and returning her some chattels belonging to the daughter.

In an action for the cost of six years' support of the children, in which she sought to show that she was induced to sign the agreement by his verbal promise to pay for the support of the children:—

*Held*, that evidence of conversations previous to the execution of the agreement to show that promise and understanding was inadmissible.

*Held*, also, that, even if the agreement between the parties was not binding on the plaintiff because contrary to public policy, or because of its nature and effect not having been understood by her, nevertheless the defendant parted with the custody of the children, and the plaintiff received them, upon the distinct understanding that the defendant was to be under no legal liability to the plaintiff for their maintenance; and if the defendant led the plaintiff to believe that there was a moral obligation upon him to provide for his children's maintenance which he intended to fulfil,

the breach of that moral obligation could give no right to the plaintiff to recover in this action.

Judgment of BOYD, C., affirmed.

*Clute*, Q.C., for the plaintiff.

*E. G. Porter*, for the defendant.

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[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 6TH MARCH, 1899.]

### WARD v. BROWN.

*Arrest—Order to hold to bail—Discharge from custody—County Court action—Judgment in Division Court.*

The defendant, an hotel keeper, being indebted to the plaintiff and others, disposed of his stock in trade, and went, with his wife, to reside in the State of New York. Subsequently he and his wife returned to Ontario and went to reside at the home of the wife's parents. Some time afterwards he went to Manitoba seeking employment, but again returned to Ontario, when he was arrested under an order in the nature of a *ca. re.* obtained by the plaintiff in an action commenced in the County Court of Middlesex for the price of goods sold to the defendant. The plaintiff had already recovered judgment for the price of some of the same goods in one of the Division Courts in the county of Middlesex.

*Held*, on appeal by the plaintiff to a Divisional Court from an order of the junior Judge of the County Court of Middlesex discharging the debtor from custody, that, as an order to hold to bail can only issue before judgment is had, and the claim in the County Court action was the same, at least in part, and so as to reduce the cause of action to a sum of less than \$100, as that in the Division Court, in which the plaintiff already had judgment, the defendant was entitled to his discharge from custody; and the appeal was dismissed with costs.

*Aylesworth*, Q.C., for the plaintiff.

*H. D. Gamble*, for the defendant.

[9TH MARCH, 1899.]

## THOMSON v. CUSHING.

*Equitable execution—Interest in land—Writ of fi. fa.—Necessity for—Amendment.*

On an appeal by the plaintiff from the judgment of MEREDITH, C.J., 30 O. R. 123, *ante* 33:—

*Held*, affirming that judgment, that the action could not be maintained, as the plaintiff had no execution in the sheriff's hands when it was commenced; and the Court refused an amendment allowing the plaintiff to sue "on behalf of himself and other creditors," on the ground that it would not assist the plaintiff, as this was not a class action.

*E. D. Armour*, Q.C., and *H. J. Martin*, for the plaintiff.

*Shepley*, Q.C., for the defendants Maria Sawtell and Caleb Cushing.

*A. W. Briggs*, for the defendant Edward Sawtell.

*A. J. Boyd*, for the infant defendants.

[27TH MARCH, 1899.]

## THOMPSON v. PEARSON.

*Costs—Scale of—Ascertainment of amount—County Courts Act, R. S. O. c. 55, s. 23 (2)—Contract.*

The defendant employed the plaintiffs as his brokers to sell on his account 200 shares of stock at a named price, the plaintiffs undertaking that in the event of loss the defendant's liability should not exceed \$200. In an action upon this contract the plaintiffs recovered \$200 and interest.

*Held*, FALCONBRIDGE, J., dissenting, that the amount of \$200 recovered was ascertained by the act of the parties within the meaning of s. 23 (2) of the County Courts Act, R. S. O. c. 55, and therefore recoverable in a County Court.

Decision of MEREDITH, C.J., *ante* 37, reversed.

*J. H. Denton*, for the defendant.

*R. McKay*, for the plaintiffs.

[BOND, C., FERGUSON, J., ROBERTSON, J., 18TH MARCH, 1899.

In re MASSACHUSETTS BENEFIT LIFE ASSOCIATION.

### JUNKIN'S CASE.

### BABCOCK'S CASE.

*Life insurance—Benefit society—Total disability—Non-payment of assessments after claim made—Forfeiture—Vested right—55 V. c. 89, s. 42—Application of, to contract—Novation.*

Certificates of life insurance issued by a benefit society provided that in case of total disability, one-half the amount of the insurance should be payable to the insured. This was subject to the following conditions, among others:—

“3. If the assured shall, at any time within thirty days after receiving due notice, fail to pay . . . the assessments . . . then . . . the association shall not be liable for payment of any sum whatever, and this certificate shall cease and determine.”

“7. In every case when this certificate shall cease and determine . . . all payments thereon shall be forfeited to the association . . .”

A call was made by the association on the 1st March, 1897, payable on the 1st April, and notice given to J., who was then a member in good standing; on the 10th March he made a claim for total disability; and made default in paying the call on the 1st April. Further notice was given him by letter of the 9th April, by which he was to pay in fifteen days, but he failed to do so; and afterwards, upon a reference for the winding-up of the company, sought to prove a claim.

*Held*, that he was not entitled.

B. made claim for total disability on the 18th February, 1897, and put in the usual proofs, but no response was made by the association. He paid the call due on the 1st April, and no further call was made till the 1st June.

*Held*, that his right of action vested before any subsequent call was made, and it was not essential for him to continue his membership after default arose on the part of the association to pay his claim; and therefore there was no bar to his establishing his claim upon the reference.

Default of the association arose after sixty days from the furnishing by B. of proofs of total disability; for s. 42 of 55 V. c. 39 (O.) applied to the contract, there having been a novation, after the passing of that Act, of the original insurance contract, which was made in 1885.

*J. H. Moss*, for the appellant Junkin.

*Tremear*, for the appellant Babcock.

*Watson*, Q.C., for the liquidator.

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[BOYD, C., FERGUSON, J., 18TH MARCH, 1899.]

*In re* MASSACHUSETTS BENEFIT LIFE ASSOCIATION.

PALFRAMAN'S CASE.

*Life insurance—Benefit society—Total disability—Conditions of policy—Effect of winding-up order.*

A certificate of life insurance issued by a benefit society provided that in the event of the insured becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of the society, there should be paid to the member, at the option of the board, if he should so request in writing at any time while the policy was in full force, upon the surrender to the society and the cancellation of the certificate, in full discharge and settlement of all claims under the contract, one-half of the amount of the insurance.

Under this a claim for total disability was made after an order for the winding-up of the society.

*Held*, that the effect of the order was to destroy the functions of the directors and officers, and practically to determine the contract; and, as the conditions upon which the total disability benefit was to become payable were impossible of fulfilment, the claimant was not entitled to move in the winding-up proceedings; but the denial of his claim was to be without prejudice to his proving for damages or otherwise on his policy.

*J. J. MacLennan*, for William Palframan.



*J. D. Montgomery*, for Maria Gamble and Alexander Turpel.

*Starr*, for John R. Murray.

*Watson*, Q.C., for the liquidator.

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[20TH MARCH, 1899.]

DANGER v. LONDON STREET R. W. CO.

*Street railways—Negligence—Operation of car—Collision—Contributory negligence—Proximate cause—Nonsuit.*

Where the evidence of negligence and of contributory negligence are so interwoven that contributory negligence is brought out and established on the evidence of the plaintiff's witnesses, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a nonsuit.

*Wakelin v. London and South-Western R. W. Co.*, 12 App. Cas. at p. 52, referred to.

In an action against a street railway company for negligence, it appeared that an electric car of the defendants was being run at a very rapid speed, and that the gong was not sounded as the car approached a certain street, at the junction of which the plaintiff, who was driving a horse along the same street and in the same direction in which the car was going, turned to cross the rails, when a wheel of his vehicle was struck by the car, and he was injured. It also appeared by the evidence of his own witnesses that he did not, before turning, look or listen to ascertain the position of the car, although he knew it was coming.

*Held*, that this was negligence on his part, and was the proximate cause of the disaster, for the defendants could not, by the exercise of reasonable or any degree of diligence or care, after this negligence of the plaintiff, have avoided the misfortune.

Nonsuit affirmed.

*J. B. Clarke*, Q.C., for the plaintiff.

*Hellmuth*, for the defendants.

[MEREDITH, C.J., ROSE, J., 21ST MARCH, 1899.]

*In re* SIMPSON AND CLAFFERTY.

*Appeal—County Court Judge—Order of—R. S. O. c. 147, s. 30—R. S. O. c. 78, s. 38—R. S. O. c. 55, s. 52—Persona designata.*

By s. 30 of the Assignments Act, R. S. O. c. 147, an assignee for the benefit of creditors is enabled to take the proceedings authorized by s. 32 of the Creditors' Relief Act, R. S. O. c. 78, and, if he does so, the provisions of ss. 32 and 33 of that Act are to apply, *mutatis mutandis*, to proceedings for the distribution of moneys and determination of claims arising under an assignment.

*Held*, that an order of a County Court Judge dismissing an application by a claimant, under s. 30, to vary the scheme of distribution made by the assignee of a debtor, was made by him as *persona designata*, and there was no appeal therefrom either by virtue of s. 38 of the Creditors' Relief Act, or of s. 52 of the County Courts Act, R. S. O. c. 55, or otherwise.

*In re Pacquette*, 11 P. R. 463, and *In re Young*, 14 P. R. 303, approved and followed.

*In re Waldie and Village of Burlington*, 13 A. R. 104, distinguished.

Watson, Q.C., for the appellant.

Wilkes, Q.C., for the respondent.

[MEREDITH, C.J., 4TH MARCH, 1899.]

BURTON v. DOUGALL.

*Deed of land—Mistake in name of grantee—Void conveyance—Title.*

A mortgage on lands was executed by the owner of the lands, in which the mortgagee was named as "Clara Benton." The real name of the intended mortgagee was Mary Jane Burton. "Clara Benton" was neither a name which the intended mortgagee had assumed, nor was it one by which she was known, but it was inserted by mistake.

*Held*, that the mortgage was inoperative except so far as it operated in equity, and did not pass the legal estate to

Mary Jane Burton, who therefore could not make a good legal title to a purchaser under the power of sale contained in it.

*W. R. Riddell*, for the plaintiff.

*W. M. Douglas*, for the defendant.

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[ROBERTSON, J., 27TH JANUARY, 1899.]

*In re* CALDWELL AND TOWN OF GALT.

*Municipal corporations—By-law—Contracting debt—Publication—Blank dates—Debentures—Interest—Description of property—Power to apply money.*

Where a municipal by-law for contracting a debt, as published and submitted to the ratepayers, provided that it would come into operation on the                      day of                      , A.D.                      :—

*Held*, that the reference to the date of its taking effect, being in blank, could be treated as surplusage, as s. 384, s.-s. 2, of the Municipal Act provides that “if no day is named, it shall take effect on the day of the passing thereof,” and that it was not necessary to its validity to name the day.

The by-law, as published, left blank the days of payment of the debentures and the dates on which the interest should be payable in each year, but, as passed, declared that the “said debentures shall be payable on the 8th day of August, A.D. 1918 (being twenty years at furthest from the date on which this by-law takes effect),” and that the “interest thereon shall be payable half-yearly on the 8th days of February and August in each year.”

*Held*, that the by-law, on the face of it, was legal, and that unless it be illegal on its face, it is discretionary with the Court to say whether there is such manifest illegality that it would be unjust that it should stand, or that it had been fraudulently or improperly obtained.

The preamble of the by-law, as published, recited the necessity for raising two certain named sums for interest and payment of the debt, and separately provided for the raising of one sum, including both mentioned in the recital.

*Held*, that the recital and the enacting clause together made it quite clear what was to be done, and the including both sums in one in the enacting clause was no objection to the by-law.

The by-law contained this recital: "Whereas it is necessary and expedient to raise the said sum of \$10,000 to pay expenses for opening up a street between M. street and H. street, through the property known as the A. property and other properties, so as to continue and extend A. street in a southerly direction between M. street and H. street." There was nothing to show that any by-law had been passed expropriating any particular parcel of land, giving the dimensions therefor, for the purpose of extending A. street, the simple fact being that the by-law in question provided for the issue of debentures for \$10,000, without any authority to apply or expend the same.

*Held*, that the by-law was upon this ground invalid.

*DuVernet* and *W. D. Card*, for the applicant.

*E. D. Armour*, Q.C., and *J. B. Irwin*, for the municipality.

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[STREET, J., 16TH MARCH, 1899.]

*In re* BELL.

*Will—Restraint on alienation—Validity—Attempt to alien—Forfeiture—Heirs-at-law.*

A testator devised land to his three sons, in equal shares, in fee simple, adding, "without power to them or any of them to charge or alien the same or any part thereof except by . . . will."

*Held*, following *Re Winstanley*, 6 O. R. 315, a valid restraint on alienation.

The three sons were the sole heirs-at-law of the testator. After becoming entitled to the possession of the land under the devise, they joined in a mortgage of it in fee to a stranger. One of the three then contracted to sell his share to the other two.

*Held*, that each of the devisees, by making the mortgage, had forfeited his estate under the will, and each had become entitled as heir-at-law to an undivided third of the whole; and therefore the vendor could make a good title in fee simple to his undivided share to his brothers, the purchasers.

*Idington*, Q.C., for the vendor.

*A. W. Ballantyne*, for the purchasers.

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### IN CHAMBERS.

[STREET, J., 18TH MARCH, 1899.]

#### MOLSONS BANK v. COOPER.

*Costs—Set-off—Solicitor's lien—Prejudice of—Probable source of payment.*

The plaintiffs, having recovered judgments for large sums against the defendants, sought to set off such sums, *pro tanto*, against certain costs adjudged to be paid by the plaintiffs to the defendants, but the solicitor for the defendants asserted a lien for his costs upon the judgment for these costs recovered by his clients against the plaintiffs. The defendants themselves were worthless, but there was another source from which it was probable that the defendants' solicitors would obtain payment of their costs.

*Held*, that this was not enough; if the solicitors had a certainty of being able to recover their costs from another source, the set-off could be ordered, because the lien would then be unnecessary; but, it being merely a probability, the set-off could not be ordered without its operating to the prejudice of the solicitors' lien, because, should that source fail, the lien could not be replaced; and therefore, under Rule 1165, the set-off should not be ordered.

*Shepley*, Q.C., for the plaintiffs.

*Aylesworth*, Q.C., for the defendants.

[20TH MARCH, 1899.]

## DELAP v. CHARLEBOIS.

*Costs—Taxation—Counsel fees—Change in tariff.*

An appeal to the Court of Appeal was heard in 1894, but the costs thereof awarded to one party against the other were not taxed until 1899.

*Held*, that the counsel fees on the argument must be taxed in accordance with the tariff in force in 1894, notwithstanding the provisions of Rules 2 and 1178 and the alteration made in the tariff as to such counsel fees: *c.f.* item 155 of tariff A. appended to Consolidated Rules of 1888 with item 149 of tariff A. appended to the Rules of 1897.

*Arnoldi*, Q.C., for the plaintiffs.

*L. G. McCarthy*, for the defendants.

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NOVA SCOTIA

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In the Supreme Court.

IN CHAMBERS.

[GRAHAM, J., 14TH FEBRUARY, 1899.]

## LANGLEY v. BELCHER.

*Pleading—Statement of claim—Departure from claim indorsed on writ of summons—Rectification of mortgages—Verbal agreement—Fraud.*

The plaintiff and defendant entered into a written agreement for the sale and purchase of a hotel property for \$8,000. They made a verbal agreement that this sum should be paid by certain instalments. Three mortgages were drawn up. The plaintiff complained that the mortgages were drawn in such a manner that the instalments were payable at different times from the times of the verbal agreement. The indorsement on the writ of summons asked for the "rectification of the written agreement between" the parties, and the

statement of claim asked to have the mortgages rectified so as to conform to the verbal agreement.

Upon an application to have the 4th paragraph of the statement of claim struck out as containing a clause of action not contained in the indorsement:—

*Held*, that Order 20, Rule 2, permitted the departure from the claim made in the indorsement of the writ, and at any rate it would have been of no avail to ask to have the written agreement rectified unless the mortgages, the later instruments, were also rectified, and this must have been implied in the indorsement.

*Held*, also, that there may be rectification where there is fraud, despite *Feindel v. Zwicker*, 31 N. S. Reps. 232. The ground of that decision was that the party guilty of the fraud never intended to agree to convey the larger area, and therefore the deed could not be rectified so as to embrace it.

*Semble*, that the mortgage might be reformed notwithstanding that the agreement was not in writing: Brown on Statute of Frauds, s. 441 *et seq.*

Application dismissed with costs.

*Roscoe*, Q.C., for the plaintiff.

*W. B. A. Ritchie*, Q.C., for the defendant.

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[MEAGHER, J., 7TH MARCH, 1899.]

### REGINA v. DOHERTY.

*Canada Temperance Act—Conviction—Service of summons—Constable—Appearance—Waiver of defect—Adjournment to consider judgment—Day and hour named—Absence of defendant—Costs of commitment—Surplusage—Certiorari—Discretion—Remedy for excess—Tender.*

The defendant was summoned to appear before a stipendiary magistrate for an offence against the Canada Temperance Act. He did not appear personally, but sent his solicitor, who attended at the hearing and objected to its proceeding, on the ground that the person who served the summons was not a constable or other peace officer for the town in which the alleged offence was committed. The defendant's solicitor cross-examined the constable and renewed his objection. Another witness was called and proved the

offence charged. The stipendiary then adjourned the Court until a later day, at a certain hour, apparently for the purpose of preparing his judgment, and at the time to which he adjourned he delivered judgment and convicted the defendant.

This was a motion for certiorari on three grounds: (1) that the person who served the summons was not a constable; (2) that the adjournment was illegal; and (3) that the conviction improperly awarded costs of commitment, as well as costs of conveying to gaol.

*Held*, that the person who served the summons not being a party to the proceeding, upon such an inquiry as this, between third parties, his right or title to office could not be inquired into: *Casey v. Smith*, 26 N. S. Reps. 177; *Regina v. Gibson*, 29 N. S. Reps. 5; and *Attorney-General v. O'Neill*, 26 S. C. R. 122. At any rate the appearance cured any defect that might have been in the service: *Blois v. Richards*, 1 R. & G. 203; *Regina v. Clarke*, 19 O. R. 601; *Regina v. Roe*, 16 O. R. 3; *Harvey v. Hall*, 23 L. T. N. S. 391; *Regina v. Carrick*, 16 Cox 571.

2. That the magistrate's power to adjourn cannot be questioned, and under the facts of the case, if the defendant was not present when the judgment convicting him was pronounced, it was his own fault and that of his solicitors, of which he could not be permitted to take advantage: *Regina v. The Cinque Ports*, 17 Q. B. D. 191.

3. That possibly the use of the words "costs of commitment" was irregular, but as there are no costs of commitment apart from the costs taxed and allowed in the conviction and warrant of commitment, these words were harmless. Assuming that these words were improperly in the conviction, they were mere surplusage, and if the certiorari were granted it would only result in an amendment by striking the words out. This would be an idle proceeding.

The granting of a certiorari is discretionary, even though there are fatal defects on the face of the proceedings sought to be brought up: *Regina v. Manchester R. W. Co.*, 8 A. & E. 413.



The imposition of costs of this character is not regarded as part of the punishment or penalty: *Regina v. Murray*, 19 O. R. 691.

*Semble*, that even if an attempt had been made to enforce a warrant of commitment in respect of the costs of commitment and the fine and the other costs, the defendant's remedy would have been to tender the amount due: *Skingley v. Larridee*, 11 M. & W. 516; *Regina v. Sanderson*, 12 O. R. 183.

*W. B. A. Ritchie*, Q.C., for the defendant.

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[8TH MARCH, 1899.]

### BOOK v. FORSYTH.

*Evidence—Foreign commission—Party to action—Discretion—Facts and circumstances.*

The granting of a commission to examine witnesses abroad is, to a considerable extent at least, a matter of discretion, but where, from the nature of the case, or of the issues involved, or from other circumstances, the personal presence of the witness for cross-examination is essential, an order for a commission will not, as a general rule, be granted.

Therefore, where it was sought to examine the defendant, an assignor, now resident in Leipzig, Germany, (1) as to the stock that came into his assignee's hands under the assignment, (2) to explain discrepancies and losses, (3) as to the position and accounts of certain trust estates, (4) as to collections made and moneys received by the assignor as the assignee's agent and other monetary transactions, and (5) touching the advisability of a sale of certain real estate, and whether it had been assented to by certain creditors:—

*Held*, that a commission should not issue under these circumstances, having regard to the facts that the assignor could have been examined before leaving for Germany without any difficulty; that it was not shown that the information sought was not obtainable at home, nor that the witness would not return to be examined, nor that he had ever been asked to do so. Moreover, if, as it would appear, the defendant witness had been guilty of any misconduct as the assignee's agent, he would be reluctant to testify, and should

be subjected to a critical cross-examination, which it was not shown could be had.

*Jobson v. Palmer*, 9 Times L. R. 106, and *Lawson v. Vacuum Brake Co.*, 27 Ch. D. 137, referred to.

*T. F. Congdon* and *C. F. Tremaine*, for the plaintiff.

*H. W. C. Boak*, for the defendant.

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[18TH MARCH, 1899.]

### MUNNIS v. SALTERIO.

*Conditional sale of goods—Seizure under execution—Claim by vendor—Sale by sheriff—Action against sheriff—Subsequent payment by purchaser to vendor—Estoppel—Subrogation—Parties.*

The plaintiff, under a judgment against the defendant, in the spring of 1894 seized and sold under execution a piano in the possession of the defendant, and realized the sum of \$148.50. The execution was returned satisfied to that extent. In the following year a further execution was issued, and the balance on the judgment collected, and the execution returned satisfied.

Miller Brothers, from whom the defendant held the piano under a purchase and hiring agreement, forbade the sale and notified both the plaintiff and the sheriff that the piano belonged to them, and not to the defendant. The plaintiff obtained legal advice to the effect that the non-filing of that agreement avoided it as to him, and acting thereon proceeded with the sale, having first agreed to indemnify the sheriff.

In June, 1898, after the decision of *Guest v. Diack*, 29 N. S. Reps. 504, Miller Brothers brought an action of trover against the sheriff for the seizure and sale of the piano, which was pending undetermined.

The plaintiff was now advised that at the time of the sale Miller Brothers had the title to the piano, notwithstanding the non-filing of the agreement, and he was desirous of settling their suit, but before doing so moved to have the return to the execution, so far as it related to the sale of the piano, amended so that the execution would, as to \$148.56, appear unsatisfied.

The defendant opposed the motion, and by his affidavit showed that since the levy and sale referred to he had entered into a special agreement with Miller Brothers and agreed to pay them a certain sum in settlement of their claim against him in respect of that piano, and another one which he obtained from them a few weeks after the levy and sale, and that he had settled with them, and fully paid them for both pianos.

*L. M. Johnstone*, for the plaintiff.

*T. F. Tobin*, for the defendant.

MEAGHER, J.—I assume that the defendant's statement is true. It has not been met or shaken in the slightest degree. Miller Brothers, if they recover against the sheriff, will get paid twice over for the same piano. If I amend the return, Salterio, who has already paid for the piano, will be obliged under the execution to pay the sum for which it sold to Munnis, and his only recourse will be by an action against Miller Brothers to recover back from them what he paid them for this piano under the special arrangement which he made with them after the levy and sale.

All parties seem, in a measure at least, ultimately to have acquiesced in Munnis's right to sell the piano when he did, as against the Millers and Salterio; if Salterio's statement is true, as I take it to be, there is ground for saying that the Millers deliberately elected to regard Salterio as the owner of the piano, so far as Munnis's right to levy on it and sell it was concerned.

I do not say that this would constitute an estoppel, but I do think, although the matter was not discussed, that it would, in view of other facts before me, afford some ground for enabling Munnis to claim, in a proper proceeding, that he became subrogated, or is entitled so to become, to Salterio's rights in respect at least to the sums paid to the Millers by him. In other words, that it is open to him to say that Salterio and the Millers, by their conduct, the subsequent agreement, and the payments referred to, conclusively elected to construe the agreement as vesting the title to the piano in Salterio, and must be held as against Munnis to that view.

If, however, on the other hand, the sheriff fails in the defence to the Millers' action, Munnis will be obliged to pay all he recovered by the sale under the execution, or perhaps more; and in that view ought to be free to pursue Salterio for the amount credited on the judgment arising from the sale of the piano.

If Miller Brothers have been paid for the piano, and I have no doubt they have, they ought not to seek for more. I say this even if they agreed, under the special arrangement with Salterio, to accept less than they were entitled to demand from him under the agreement existing at the date of the levy.

There may be a difficulty in the way of adding parties to the suit so as to secure an adjustment of the rights of all parties in the action brought by the Millers and prevent further litigation. That question was not discussed at the argument, and I do not quite see how it can be done.

I have no doubt that under our old system a suit in equity might have been maintained in which the rights of all parties would be determined and adjusted.

If Munnis and Salterio were defendants in the present action, I think issues could perhaps be framed and sent down for trial which would cover every aspect of the dispute between all the parties interested.

With respect to the present motion, it is enough for me to say that I do not see that I can make any determination which would not be liable to prejudice Munnis or Salterio on the one hand or the other. I do not, therefore, think that I ought to dispose of the matter at this stage and upon the material before me in the summary way this application calls for.

I shall therefore adjourn the motion indefinitely so as to give the parties an opportunity either to move the Court, or to add parties and have issues tried, or to agree upon a case, or to intervene in the suit against the sheriff, or to bring a further suit, as they may be advised.

[14TH MARCH, 1899.]

## MANLEY v. TEMPERANCE AND GENERAL LIFE ASSURANCE CO.

*Writ of summons—Service on foreign corporation—Insurance company incorporated under Dominion Act.*

A company incorporated by the Parliament of the Dominion of Canada is a company associated or incorporated out of Nova Scotia, and can be proceeded against, when doing business within Nova Scotia by an agent, under Order 57 of the Nova Scotia Judicature Act. Section 13 of R. S. C. c. 124, providing a method of service of process on insurance companies, is only permissive and not exclusive.

Application to set aside writ and service refused with costs.

*J. J. Mathers* and *J. L. McKinnon*, for the plaintiff.

*J. A. Chisholm*, for the defendants.

[14TH AND 21ST MARCH, 1899.]

## TERNON v. WILLIS.

*Particulars—Statement of claim—Application after defence delivered—Special circumstances—Explanation of delay—Costs.*

The defendant, after delivery of defence, applied for particulars of certain allegations in the plaintiff's statement of claim, and in support of the motion his solicitor read an affidavit merely showing that he believed that the particulars were necessary for the proper trial of the action, and the application was not made for delay.

*Held*, that, after defence delivered, the defendant was in a different position from that he would have been in had he applied before. He was now bound to show special circumstances entitling him to the particulars: *Chit. Arch.* p. 383.

*Held*, further, that the plaintiff must have his costs of opposing the application, but the defendant would be heard again and permitted to show any special circumstances entitling him to the order asked for.

On a subsequent Chambers day the defendant's solicitor read a supplementary affidavit by the defendant, showing that he, the defendant, had no knowledge of the matters asked for as particulars, and did not know what case he would have to meet at the trial nor what witnesses he would need. He gave no explanation, however, for his delay in applying for particulars.

An order for a number of the particulars asked for was granted, and costs were made costs in the cause, but the defendant not in any event to have the costs of his affidavit, because of its unsatisfactory nature in omitting to explain the cause of delay in moving.

*W. F. O'Connor*, for the plaintiff.

*J. A. Knight*, for the defendant.

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## MANITOBA.

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### In the Queen's Bench.

[DUBUC, J., 8TH MARCH, 1899.]

FORREST v. GREAT NORTH-WEST CENTRAL R. W. CO.

*Company—Contract of hiring—Chief engineer—Want of seal—Performance—Salary and "usual expenses"—Definition of.*

The plaintiff was employed by the defendants as chief engineer of their line from October, 1891, to the 14th May, 1893, at a salary of \$250 per month and his usual expenses; he brought this action to recover a balance of salary amounting to \$2,662.90, and \$310.98 for expenses. The principal defence set up was that there was no contract between the plaintiff and the defendants under the corporate seal of the defendants, and therefore they were not liable. The evidence showed that the plaintiff received a telegram as follows:—"Will you accept position chief engineer at \$250 per month," which telegram was signed "J. A. Codd, president."

The plaintiff replied that he would accept. Then the president wrote him a letter in which he informed the plaintiff that he had been appointed chief engineer at \$250 a month, and he gave him instructions as to the work he was required to perform. In another letter the president wrote the plaintiff that the \$250 was exclusive of expenses usually allowed. The plaintiff went to work and performed the duties of chief engineer; his name was on the pay list of the defendants, which was prepared by the accountant and certified to by the auditor; and he was paid his salary according to the list.

*Held*, that the plaintiff was entitled to recover the amount claimed for salary; as, under *Benardin v. Municipality of North Dufferin*, 19 S. C. R. 581, a corporation is liable on an executed contract for the performance of work within the purpose for which it was created, which work it has adopted, and of which it has received the benefit, though the contract was not executed under its corporate seal.

In the amount claimed by the plaintiff as expenses, he charged for his board at a hotel at Brandon, the headquarters of the company in Manitoba, and at different places along the railway line.

*Held*, that he could not recover his board while at headquarters. The words "usual expenses" must be construed to include what was intended by such words in ordinary circumstances. In general when a person is engaged at a certain fixed salary and usual expenses, it is not commonly understood that the usual expenses include ordinary board at headquarters. When an employee at a fixed salary leaves his usual quarters and travels for his employer in the performance of his functions, he is supposed to be reimbursed for his travelling expenses, including his board.

Judgment for the plaintiff for unpaid salary and \$30 for expenses.

*Mathers*, for the plaintiff.

*Bradshaw*, for the defendants.

[DUBUC, J., 9TH MARCH, 1899.]

CLAY v. GILL.

*Attachment—Insolvency of debtor—Promissory note given by debtor to insolvent after attachment—Action by purchaser of book debts.*

M. A. Spratt was carrying on business through R. J. Spratt, her husband and manager, under the style of Spratt & Co. She became insolvent, and on the 8th February, 1898, the sheriff took possession of her store under an order for attachment. On the 4th March she made an assignment to D. Fraser. On the 19th March Fraser assigned to the plaintiff all the book debts of Spratt & Co., including an account against the defendant, on which the plaintiff brought an action in the County Court. Judgment was given in favour of the defendant, and the plaintiff appealed.

The defence set up was that the defendant had satisfied and discharged the account by payment, without notice of the assignment, and before the date of the assignment.

On the 9th February, after the sheriff was in possession, R. J. Spratt went to the defendant to have the account settled, when the defendant made his promissory note for the amount due, to the order of Spratt & Co., and gave it to R. J. Spratt. The note was antedated the 5th February, 1898, and made payable two months after date. R. J. Spratt gave the defendant a receipt in full of account up to date, and signed the receipt as Spratt & Co. The note was afterwards indorsed "Spratt & Co.," by R. J. Spratt, to himself, and on the 11th June, when this case came on to be tried, R. J. Spratt indorsed the defendant's note with others to W. F. Sirett. On the same day Sirett mailed the notes to the Union Bank, Neepawa, to be held as security for money he owed the bank.

*Held*, that, as the note was overdue when R. J. Spratt indorsed it for Spratt & Co. to himself, and when he transferred it to Sirett, and then Sirett pledged it to the bank, it was transferred with all equities attaching to it, and the holder was not a holder in due course according to s. 29 of the Bills of Exchange Act, 53 V. c. 33.



After the order of attachment Spratt & Co. had no control over the account, and had no right to deal with it. At the time the note was given the account was vested in the sheriff for the attaching creditor, and the transaction between Spratt & Co. and the defendant as to the note and the account was fraudulent and void. Spratt & Co. had no right of action against the defendant for the amount of the note; and, as by the note having been transferred after maturity, the holders thereof acquired no better title to it than was held by Spratt & Co., the defence which the defendant might have raised against Spratt & Co. could be set up against the holders of the notes.

*Ewart, Q.C., for the plaintiff.*

*Bradshaw, for the defendant.*

## Supreme Court of Canada.

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EXCHEQUER COURT.]

[22ND FEBRUARY, 1899.

REGINA v. OGILVIE.

*Crown—Contract—Conflict of laws—Appropriation of payments—Receipt—Error—Rectification.*

A bank borrowed from the Dominion Government two sums of \$100,000 each, giving deposit receipts therefor, respectively numbered 323 and 329. A further loan of a like amount was refused, but afterwards was made, upon O., one of the directors of the bank, becoming responsible for repayment, and the receipt for such last loan was numbered 346. The Government having demanded payment of \$50,000 on account, that sum was transferred in the bank books to the general account of the Government, and a letter from the president of the bank to the finance department stated this had been done, enclosed another receipt numbered 358 for \$50,000 on special deposit, and concluded: "Please return deposit receipt No. 323—\$100,000 now in your possession." Subsequently \$50,000 more was paid, and a return of receipt No. 358 requested. The bank having failed, the Government took proceedings against O. on his guaranty for the last loan made to recover the balance after crediting payments and dividends received. The defence to these proceedings was that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the guaranteed loan, and that the president had instructed the accountant so to apply the two sums of \$50,000 paid, but he had omitted to do so. The trial Judge in the Exchequer Court gave effect to this objection and dismissed the information of the Crown.

*Held*, reversing the judgment below, 6 Ex. C. R. 21, 18 Occ. N. 77, TASCHEREAU and GIROUARD, JJ., dissenting, that, as the evidence showed that the president knew what the accountant had done and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made, was a sufficient act of appropriation by the creditor within Art. 1160, C. C., no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so, the bank could not now annul the imputation made by the accountant, unless the Government could be restored to the position it would have been in if no imputation at all had been made, which was impossible, as the Government would then have had an option which could not now be exercised.

*Fitzpatrick*, Q.C., S.-G., and *Newcombe*, Q.C., for the Crown, appellant.

*J. S. Hall*, Q.C., and *Hogg*, Q.C., for the respondent.

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ONTARIO.]

[14TH DECEMBER, 1898.]

### WEST v. BENJAMIN.

*Partnership—Accounts—Stated and settled account—Estoppel—Managing partner.*

One of the two partners constituting a firm had the sole management and control of its affairs, the other lacking business capacity. The managing partner at intervals presented statements of the business to his co-partner, who signed them on being assured of their correctness, and in 1891 mutual releases of all claims and demands were executed by each, based on the statements so furnished by the active partner. In an action against the latter to have these releases set aside and the accounts re-opened, it was found at the trial, on the evidence of an accountant who had examined the books of the firm, that a large loss would result to the plaintiff if the accounts were maintained as settled, and the trial Judge referred it to a Master to take the accounts. On appeal from his judgment the reference was restricted to certain specified items.

*Held*, reversing the judgment of the Court of Appeal and restoring that of the trial Judge, but varying it so as to make the inquiry begin at a date beyond which the plaintiff did not desire to go, that all it was necessary to establish in order to set aside the releases pleaded and to open the accounts was that in the accounts as settled there were such errors or mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed.

*Aylesworth*, Q.C., and *J. H. Madden*, for the appellant.

*Clute*, Q.C., and *Masten*, for the respondent.

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[22ND FEBRUARY, 1899.]

### KNIGHTS OF MACCABEES v. HILLIKER.

*Life insurance—Benefit society—Non-payment of assessments—Forfeiture—Waiver—Pleading.*

H., a member of a benefit society holding a certificate for \$3,000, died while under suspension for non-payment of two monthly assessments. His widow brought an action for the amount of the certificate, alleging that the forfeiture was waived for several reasons: namely, that the deceased had no notice of the call for the assessments; that he was entitled to notice that he was in arrears; that he had been illegally suspended; and that the local "tent" of the order had been suspended during the period covered by the unpaid assessments, and therefore payment was impossible. The trial Judge refused to nonsuit, and gave judgment in favour of the widow for the amount claimed, which judgment was affirmed by an equal division of the Court of Appeal.

*Held*, reversing the judgment of the Court of Appeal, that the waiver not having been pleaded, it could not be relied on by the plaintiff as an answer to the plea of non-payment, and if it could, the facts relied on were no answer.

*J. A. Paterson*, for the appellants.

*F. R. Ball*, Q.C., and *R. N. Ball*, for the respondent.

[22ND MARCH, 1899.]

**MCGREGOR v. TOWNSHIP OF HARWICH.**

*Municipal corporations—Negligence—Obstruction of road—Statutory officer—Liability for acts of.*

M. and his wife were driving along a public highway, when the carriage coming upon a lot of gravel piled on the road was upset, and the wife seriously injured. In an action against the municipal corporation for damages it was proved that statutory labour had been performed on the road where the accident occurred, and that gravel had been hauled to and dumped there for the purpose. The work was done under the superintendence of the pathmaster, who was appointed by the council under the Municipal Act. There was no direct evidence as to who dumped the gravel which caused the accident, but witnesses connected with the work swore that none had been hauled there except what was required for the statutory labour.

*Held*, affirming the judgment of the Court of Appeal, that, in the absence of evidence that it had been dumped there by orders of the council, or of some person for whose acts the council was responsible, the plaintiff could not recover.

*Quaere*, per STRONG, C.J., whether the corporation would be responsible for the acts of a statutory officer like the pathmaster, or of a ratepayer performing statute labour.

*Gundy*, for the appellants.

*M. Wilson*, Q.C., for the respondents.

QUEBEC.]

[22ND FEBRUARY, 1899.]

**QUEBEC, MONTMORENCY, AND CHARLEVOIX R. W.  
CO. v. GIBSONE.**

*Railways—Expropriation of land—Title to land—Tenants in common—Construction of agreement—Misdescription—Plans and books of reference—Satisfaction of condition as to indemnity—Registry laws—Estoppel.*

In matters of expropriation, where a railway company has complied with the directions and conditions of Arts. 5163

and 5164, R. S. Q., as to deposit of plans and books of reference, notice and settlement of indemnity with the owners, or with at least one-third of the owners *par indivis*, of lands taken for railway purposes, the title to the lands passes forthwith to the company for the whole of the property by mere operation of the statute, even without the consent of the other owners *par indivis*, and without the necessity of formal conveyance by deed, in compliance with the formalities prescribed by the Civil Code as to registration of real rights.

The provisions of the Civil Code respecting the registration of real rights have no application to proceedings in matters of expropriation of lands for railway purposes under the provisions of the Revised Statutes of Quebec.

Pending expropriation proceedings begun against lands held *par indivis*, for the purpose of the appellants' railway, the following instrument was, on the 11th June, 1886, signed and delivered to the company by six out of nine of the owners *par indivis*, viz.:

"Be it known by these presents that we, the legatees Patterson, of the parish of Beauport, county of Quebec, do promise and agree that, as soon as the Quebec, Montmorency, and Charlevoix Railway is located through our land, in the parishes of Notre-Dame des Anges, Beauport, and l'Ange-Gardien, and in consideration of its being so located, we will sell and transfer to the Quebec, Montmorency, and Charlevoix Railway Company, for the sum of one dollar, such part of our said land as may be required for the construction and maintenance of the said railway; and exempt the said company from all damages to the rest of the said property; and that, pending the execution of the deeds, we will permit the construction of said railway to be proceeded with over said land, without hindrance of any kind, provided that the said railway is located to our satisfaction."

Afterwards the line of railway was altered, and more than one year elapsed without the deposit of an amended plan and book of reference to shew the deviation from the line as originally located. The company, however, took possession of the land and constructed the railway across it, and, in August, 1889, the same persons who had signed the above instrument

granted an absolute deed of the lands to the company for a consideration of \$5, acknowledged to have been paid, reciting therein that the said lands had "been selected and set apart by the said railway company for the ends and purposes of its railway, and being already in the possession of the said railway company since the 11th day of June, 1886, in virtue of a certain promise of sale *sous seing privé* by the said vendors in favour of the said company." Neither of the instruments was registered.

G. purchased the New Waterford Cove property in 1889, and, after registering his deed, which had been executed by all the owners *par indivis*, brought a petitory action to recover that part of the property taken by the railway company, alleging that the instruments mentioned constituted a donation of the lands, and did not come within the operation of Arts. 5163 and 5164, R. S. Q.

*Held*, that the terms of s.-s. 10 of Art. 5164, R. S. Q., were sufficiently wide to include and apply to donations; that the instrument in question was not properly a donation, but a valid agreement or "accord" within the provisions of s.-s. 10, under onerous conditions of indemnity which appeared to have been satisfied by the company; that, as the agreement stipulated no time within which the new plan should be filed, and the location appeared to have been made to the satisfaction of the required proportion of the owners, it was sufficient for the company to file the amended plan and book of reference at any time thereafter; and that, as the indemnity agreed upon by six out of nine of the owners *par indivis* had been satisfied, and the location of the railway line changed as desired, the requirements of Art. 5164, R. S. Q., had been fully complied with, and the plaintiff's action could not, under the circumstances, be maintained.

Judgment of the Court below reversed.

*Belleau*, Q.C., and *Bédard*, Q.C., for the appellants.

*Fitzpatrick*, Q.C., S.-G., and *Gibson*, for the respondents.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

## IN CHAMBERS.

[OSLER, J.A., 20TH MARCH, 1899.]

JAMIESON v. LONDON AND CANADIAN L. &amp; A. CO.

*Appeal bond—Defect in form—Uncertainty—Disallowance.*

A bond filed as security for costs of an appeal to the Supreme Court of Canada stated that the sureties were jointly and severally held and *jointly* bound, instead of *firmly* bound, and “we bind ourselves and each of us *by* himself,” instead of *binds* himself.

*Held*, that it must be disallowed. It was uncertain whether it could be properly construed as a joint and several bond, and the respondents’ rights ought not to be left in a state of uncertainty.

The bond followed the form in Cassels’s Practice of the Supreme Court of Canada, 2nd ed., p. 220, which should be corrected.

*W. H. Irving*, for the plaintiff.

*Arnoldi*, Q.C., for the defendants.

[MACLENNAN, J.A., 10TH APRIL, 1899.]

THURESSON v. THURESSON.

*Appeal—Time—Extension—Security for costs—Dispensing with—Poverty of appellants—Ejectment—Claim for improvements—Mesne profits—Mortgage.*

Motion by the defendants for an order extending the time for appealing to this Court from the order of a Divisional Court reversing the judgment at the trial and ordering judgment to be entered for the plaintiffs for possession of land



with costs, and also dispensing with security for costs of the proposed appeal.

The defendants served notice of appeal one day late.

*Held*, that the circumstances disclosed made the delay excusable, and an extension of time should be granted.

The defendants sought to have security dispensed with on the ground that they had no means or money or resources other than the land in question, and that they were unable to get any persons to become sureties, and also on the ground that they had expended \$500 upon the land in the way of improvements, in the belief that the land was their own, whereby the value had been enhanced to that extent.

*Held*, that the first ground was no reason for dispensing with security; but the other ground was one to which, in a proper case, effect ought to be given. In this case, however, there were two difficulties in the way: (1) that if the plaintiffs should uphold their judgment they would be entitled to mesne profits since 1892 as against the improvements, which had only been made in the last two or three years; and (2) that the defendants had mortgaged the land for the money laid out in improvements, and the lien, if any, was that of the mortgagee.

Order made extending the time for appealing and dismissing the other part of the motion, with costs to the plaintiffs in any event of the appeal.

*E. D. Armour*, Q.C., for the defendants.

*Aylesworth*, Q.C., for the plaintiffs.

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[Moss, J.A., 12TH APRIL, 1899.]

### ECKENSWEILLER v. COYLE.

*Appeal—Third party—“Party affected by the appeal”—Rules 799, 811—*  
*Notices—Duty of plaintiff as appellant—Duty of defendant.*

The defendants, alleging that another person was liable to indemnify them against the plaintiff's claim, caused him to be served with a third party notice under Rule 209. The third party appeared, and an order was made under Rule 213 that he should be at liberty to appear at the trial and take such part as the Judge should direct, and be bound by the result; that

the question of his liability to indemnify the defendants should be tried after the trial of the action; and that pleadings should be delivered between the defendants and him. The Judge who tried the case dismissed the action, but held the third party bound to indemnify the defendants against any costs they incurred in the action. The third party appealed from this judgment to a Divisional Court, and the plaintiff appealed to the Court of Appeal.

*Held*, that the third party was a "party affected by the appeal" of the plaintiff within the meaning of Rules 799 (2) and 811, and it was the plaintiff's duty to give notices therein provided for; but there his duty as regards the third party ended, unless he was in a position to demand some relief against him; and the third party was not by the order made before the trial placed in the position of a defendant so as to entitle the plaintiff to relief against him.

But, as the defendants, for their own convenience, brought the third party into the action, and did not procure him to be made a defendant, they should, if they desired to retain him before the Court for the purposes of the plaintiff's appeal, do whatever might be necessary to that end beyond what was required of the plaintiff under Rules 799 and 811.

*W. H. Blake*, for the plaintiff.

*Masten*, for the defendants.

*J. H. Moss*, for the third party.

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## HIGH COURT OF JUSTICE.

[ARMOUR, C. J., FALCONBRIDGE, J., STREET, J., 18TH FEBRUARY, 1899.]

*In re* PARKE.

*Municipal elections—Nomination of candidate—Keeping open meeting after lapse of hour—Municipal Act, R. S. O. c. 223, s. 128.*

The provision in s.-s. 2 of s. 128 of the Municipal Act, R. S. O. c. 223, for the closing of the meeting for the nomination

of candidates for municipal offices after the lapse of one hour, only applies where no more than one candidate is proposed, s.-s. 3 applying where more than one candidate is proposed, in which case no time limit is imposed.

Order of MEREDITH, J., dismissing a motion for a mandamus, affirmed.

*W. H. Bartram*, the appellant, in person.

No one contra.

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[28RD FEBRUARY, 1899.]

RYAN v. WILLOUGHBY.

*Municipal corporation—Contract with—Member interested in sub-contract—Duty to resign office—Refusal to carry out sub-contract—Liability.*

The defendant, who was a member of a municipal corporation, and who would be disqualified, under s. 80 of the Municipal Act, R. S. O. c. 223, from entering into or being interested in a contract with the corporation, entered into a sub-contract to do the brick and mason work of a town and fire hall, which was being erected for the corporation under a contract containing a provision that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and corporation, the defendant agreeing to resign his seat—though this formed no part of his written contract—but which he afterwards refused to do on the ground that the corporation declined to accept him as a sub-contractor, and a resolution was passed by the corporation to that effect, whereupon the defendant refused to perform the contract.

*Held*, that the defendant, by his omission to resign, had not done all in his power to enable him to perform the contract, and was therefore precluded thereby from setting up the resolution of the council as an answer to his non-performance of the contract, and was therefore liable for the damages sustained thereby.

*Shepley*, Q.C., and *D. R. Lavell*, for the plaintiff.

*Watson*, Q.C., and *J. A. Allan*, for the defendant.

[ARMOUR, C.J., STREET, J., 24TH FEBRUARY, 1899.]

TAYLOR v. SCOTT.

*Habeas corpus—Judgment on return of writ—No appeal from—Finality—Res judicata.*

A person confined or restrained of his liberty is limited to one writ of *habeas corpus* only, to be granted by any Judge of the High Court, returnable before himself or another Judge in Chambers, or before a Divisional Court, with a right of appeal to the Court of Appeal from the judgment given on the return of the writ. The judgment of the Court of Appeal is final and conclusive; and where no such appeal is taken, the judgment which might have been appealed against becomes final and conclusive; and no other writ of *habeas corpus* can issue in the matter.

And such judgment is a good answer to an action in which the same question is raised.

Judgment of MACMAHON, J., affirmed.

*W. M. Boulton*, for the plaintiff.

*J. E. Jones*, for the defendant.

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[27TH FEBRUARY, 1899.]

BUCHANAN v. INGERSOLL WATERWORKS CO.

*Water and watercourses—Prescription—Riparian rights—Artificial channel—Agreement.*

About the end of the last century an artificial channel or water race was built across a lot now owned by the plaintiffs for the purpose of carrying water from a stream above the plaintiffs' land to a mill below, the water being diverted into the channel by means of a dam. The channel and the banks on either side of it never formed part of the plaintiffs' land, having been excepted therefrom, so that their land was not contiguous to the water. In 1894 an agreement was entered into between the plaintiffs and defendants whereby the defendants, a waterworks company, acquired the right to lay pipes across the plaintiffs' land for their waterworks system, and to use, enjoy, and maintain the same for all time for the purpose thereof, and by reason thereof the water, which had

previously come down the channel or water race, was carried through the pipes, and the plaintiffs were thereby deprived of the use of the same for watering their cattle.

*Held*, that the plaintiffs were not riparian proprietors, and could not claim any right by prescription to the use of the water, and in any event, if they had any such right, it was put an end to by the agreement.

*Aylesworth*, Q.C., for the defendants.

*Wallace Nesbitt* and *J. B. Jackson*, for the plaintiffs.

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[10TH APRIL, 1899.]

### MURPHY v. PHOENIX BRIDGE CO.

*Writ of summons—Service on foreign corporation—Business within Ontario—Servant—Agent—Rule 159.*

A foreign corporation engaged in building bridges, which were partly in Ontario, had a temporary office in Ontario, in which their foreman, and a man under his immediate direction and control and subject to dismissal by him, whose duty it was to keep the time of the men employed in the work and pay their wages, attended to the office part of their duties. The corporation sent this man money which he deposited in a bank in Ontario to his own credit, and chequed it out for wages, and occasionally for other purposes of the corporation. After the work had been suspended and the foreman had left, this man was in Ontario, under directions from the corporation "to clean up everything," and while so there was served with the writ of summons in an action for negligence in the erection of one of the bridges outside of Ontario. Upon being examined as a witness by the plaintiffs, he said that he was the chief clerk in Ontario, though there "was'nt much clerkship about it."

*Held*, that he was to be deemed the agent of the corporation within the meaning of Rule 159, and the service was effective.

Decision of *MEREDITH*, C.J., reversed.

*W. H. Blake*, for the defendants the Phoenix Bridge Company.

*Mulvey*, for the plaintiffs.

[MEREDITH, C.J., MACMAHON, J., 20TH FEBRUARY, 1899.]

WALLACE v. PEOPLE'S LIFE INS. CO.

*County Court—Counterclaim—Amount required to be set off.*

In an action in a County Court to recover an amount due for salary and travelling expenses, in which there was a counterclaim for advances made to the plaintiff, the plaintiff recovered \$308.55, and the amount found to be due under the counterclaim was \$1,169.54, but only \$200 was allowed to be set off.

*Held*, that the defendants were entitled to judgment on the counterclaim to the full amount of the plaintiff's claim.

*J. J. Warren*, for the defendants.

No one appeared for the plaintiff.

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[MEREDITH, C.J., ROSE, J., MACMAHON, J., 20TH FEBRUARY, 1899.]

BRADLEY v. BARBER.

*Injunction—Injury or threatened injury to goods—Damages.*

An injunction may be granted in a County Court action to restrain the sale of a specific article which cannot properly be the subject of compensation; but not where an injury or threatened injury to goods can be duly compensated by damages.

Where, therefore, the plaintiff, who had made an assignment for the benefit of creditors, claimed the ownership and possession of a horse as an exemption, and brought an action claiming an injunction to prevent the threatened taking of the horse from him, and for a declaration of right as to its ownership, and an interim injunction was granted by the Judge of a County Court, which, on the finding of the ownership at the trial in the plaintiff's favour, was made perpetual and judgment entered for the plaintiff, the judgment was set aside and judgment entered in the defendants' favour.

*W. S. Morphy*, for the plaintiff.

*Watson, Q.C.*, and *J. R. Shaw*, for the defendants.

[21ST FEBRUARY, 1899.]

## ZIMMERMAN v. KEMP.

*Principal and surety—Proof required against surety—Administration bond.*

The plaintiff, having an unsatisfied judgment against the administratrix of an estate, procured an assignment of the administration bond, and brought an action thereon against the sureties, in which W., who had indemnified the sureties, was made a third party, and an order was made providing that the question of his indemnity was to be tried after the trial of the action, as the Judge might direct, with liberty to him to appear by counsel and defend the action and to call and cross-examine witnesses, and that he should not thereafter be at liberty to dispute the defendants' liability, if any, to the plaintiff. At the trial the judgment was put in, and one of the defendants called as a witness, who stated that the amount of the judgment was correct. W. objected that the liability had not been properly proved as against him, and there should be a reference to ascertain and determine, the defendants' liability, which was refused and judgment entered for the plaintiff.

*Held*, that the judgment so recovered was not sufficient to bind the third party, and a new trial was directed.

*W. E. Middleton*, for the plaintiff.

*H. H. Collier*, for the defendants.

*Aylesworth, Q.C.*, for the third party.

[28TH FEBRUARY, 1899.]

## THURESSON v. THURESSON.

*Limitation of actions—Real Property Limitation Act—Future estates—Deed of appointment.*

On the 20th October, 1870, the plaintiff's testator purchased certain lands, and procured a deed to be made to persons named therein, to hold to such uses as the testator should by deed or will appoint, and in default of such appointment, and so far as such appointment should not extend, to the use of the said persons, their heirs and assigns. He put his mother in possession of the land, and she continued in pos-

session up to the time of her death, which occurred on the 21st July, 1898, her two daughters having resided with her, and after her death the defendants continued to reside on the land and had been in possession ever since. In November, 1892, the testator, in the alleged exercise of the power of appointment, executed a deed conveying the lands to one B., who then re-conveyed to the testator; and on the 19th March 1897, an action was brought to recover possession.

*Held*, that the effect of the deed of the 25th October, 1870, was to vest the fee simple in the lands in the grantees to uses, subject to be divested on the exercise of the power of appointment, and that the deed of November, 1892, was a due execution thereof; that the testator's estate prior to the appointment was a future estate or interest within the meaning of s. 5, s.-s. 11, of the Real Property Limitation Act, R. S. O. c. 133, and he had five years from the execution of the deed to bring his action; and the plaintiffs were therefore entitled to recover.

*Aylesworth*, Q.C., for the plaintiffs.

*E. D. Armour*, Q.C., for the defendants.

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[FERGUSON, ROSE, ROBERTSON, JJ., 4TH MARCH, 1899.]

*In re* GILES AND VILLAGE OF WELLINGTON.

*Mandamus—Inutility of—Unnecessary relief—Municipal corporations—Assessment of farm lands—Benefit—Expenditure—Exemption—By-law—R. S. O. c. 224, s. 8, s.-ss. 2, 4.*

A writ of mandamus will not be granted when if issued it would be unavailing, or when there is no necessity for the relief, and an application for a mandamus will not be allowed to be made the occasion or excuse for obtaining the opinion of the Court on a doubtful question of law or as to the construction of an Act of Parliament.

When it appeared on the evidence that certain farm lands were not charged or assessed for any of the purposes mentioned in s. 8, s.-s. 2, of R. S. O. c. 224, a mandamus directed to the reeve and councillors of a village to pass a by-law declaring what part of the farm lands should be exempt or partly exempt from taxation for such expenditure, was refused.

*Per* ROSE, J.—The order appealed against directing the council to pass a by-law declaring the lands in question exempt



goes beyond the proper exercise of the powers of the Court, as it takes away from the council the powers and right to decide as a preliminary question whether there were any farm lands which were or were not benefited and decides, by way practically of appeal, what is to be decided by the County Court Judge under s. 8, s.-s. 4, of R. S. O. c. 224, if any appeal is there given.

Decision of ARMOUR, C.J., reversed.

*Aylesworth*, Q.C., for the appellants, the township corporation.

*Clute*, Q.C., for the applicants.

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[BOYD, C., 6TH MARCH, 1899.]

**TOWNER v. HIAWATHA GOLD MINING AND MILLING  
CO. OF ONTARIO.**

*Company—List of shareholders—Posting up—"Duplicate"—R. S. O. c. 191,  
s. 79.*

*Held*, that where the list of shareholders of an incorporated company transmitted to the Provincial Secretary showed a certain person as holding \$1,000 worth of stock, while in the list posted up in the head office of the company his name was deleted, the two lists were not duplicates within the meaning of R. S. O. c. 191, s. 79, and liability for a penalty under that section had been incurred by the company.

*Du Vernet*, for the plaintiff.

*D. O. Cameron*, for the defendants.

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[ROBERTSON, J., 3RD MARCH, 1899.]

**LAZIER v. ROBERTSON.**

*Marriage settlement—Terms of—Death of husband—"Children"—Death of  
one in mother's lifetime—Issue—Who entitled on mother's death.*

A marriage settlement conveyed certain land to trustees in trust to sell and convey as the husband and wife might

appoint, and lay out and invest the money and pay the interest to the wife during life, and in case the husband survived the wife and there was a child or children then surviving, to pay the interest to the husband during life, and after the decease of both to divide the money equally among the children, and if there was only one child to pay over the whole to such child, and in case of the death of the wife without issue to pay over the money to the husband, and in case the husband and wife did not make any appointment then in trust to support the contingent remainders thereafter limited and to pay the rents, on the same trusts as the money.

Two children were born; the husband died; one of the children attained twenty-one, married, and died before his mother, leaving his sister and a daughter surviving.

In an action in which the sister claimed the whole property:—

*Held*, that the deceased son took a vested interest, although he died before the period for conveying, and that his daughter was entitled to her father's share.

*E. G. Porter*, for the plaintiff.

*E. D. Armour*, Q.C., for the defendant Lazier.

*W. H. Blake*, for the defendant Robertson.

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[FALCONBRIDGE, J., 5TH JANUARY, 1899.]

### RACHER v. PEW.

*Life insurance—Benefit certificate—Wives and children—Re-apportionment by will—Revocation of trust—Validity.*

By the rules of a benefit society the money secured by certificate was payable upon the death of a member to his widow and children, but in this case the member, by a codicil to his will made shortly before his death, which occurred in October, 1886, directed that the moneys payable upon his certificate, which was issued in February, 1884, should be used by his widow to pay off the mortgage upon his farm. The money was paid to the widow, and she used it as directed, giving the plaintiff, a daughter of the deceased, the benefit of

maintenance on the farm until she married at the age of nineteen. The plaintiff claimed her share, alleging a trust in her favour which could not be revoked by the codicil.

*Held*, following *Videan v. Westover*, 20 O. R. 1. 18 Occ N. 17, that the provision made by the codicil was a re-portionment of the fund which the deceased had power to make.

*W. Kingston*, Q.C., for the plaintiff.

*Pepler*, Q.C., and *John Dickinson*, for the defendant Margaret Pew.

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[MACMAHON, J., 17TH MARCH, 1899.]

### WATEROUS ENGINE WORKS CO. v. PRATT.

*Contract—Execution by one party—Revocation—Refusal to accept goods—Subsequent sale by vendor—Damages.*

A contract sealed and delivered by one party, although subject to the approval of the other, cannot be revoked as in the case of an offer made, which can be revoked before acceptance.

In an action for breach of a contract for the manufacture of an engine, which was signed, sealed, and delivered by the defendant, subject to the approval of the plaintiffs, and which the defendant sought to cancel within twelve days of its execution and before approval or acceptance was notified by the plaintiffs, but which the latter declined to cancel:—

*Held*, that the plaintiffs were entitled to recover.

*Held*, also, that as the plaintiffs had subsequently sold the engine for the full amount of the contract price for the benefit of the defendant, which they had the right to do, the damages recovered should be merely nominal.

*Aylesworth*, Q.C., for the plaintiffs.

*Shepley*, Q.C., for the defendant.

[STREET, J., 15TH MARCH, 1899.]

CLARK v. BELLAMY.

*Executors and administrators—Setting apart fund—Investment of—Non-existence of—Fraud of solicitor—Negligence of executor—Representation—Agency of solicitor—Representations and payments by—Statute of Limitations.*

Two executors, relying upon the word of a solicitor who had managed the testator's affairs in his lifetime, procured from him a list of mortgages alleged to have been taken by the testator in his lifetime representing a trust fund of \$5,000 set apart by the will for the widow, but without the actual production of the mortgages, and showed it to her, informing her that the solicitor would pay her the interest. As a matter of fact, the mortgages in the list never had any existence, but the solicitor regularly paid her the interest up to the time of his death.

*Held*, that the executors neglected their duty in not setting aside the \$5,000 in money or securities, and that their duty in that respect could not be delegated.

*Held*, also, that they had appointed the solicitor their agent for the purpose of paying the interest; that statement and payments made by him were made in the course of the business for which they had employed him; that each payment was a renewal of the representation that the \$5,000 was still in their hands invested for her benefit; and they could not be allowed to set up the Statute of Limitations in answer to her claim, or that the statements they made were not true; and that they were liable to make the fund good.

*Clute*, Q.C., and *E. J. B. Duncan*, for the plaintiff.

*S. H. Blake*, Q.C., and *J. W. St. John*, for the defendant Riseborough, an executor.

*W. E. Middleton* and *R. T. Harding*, for the defendant Bellamy, an executor.

## IN CHAMBERS.

[ROBERTSON, J., 15TH APRIL, 1899.]

## REGINA v. PONTON.

*Venue—Change of—Criminal cause—Fair trial—Riot at former trial—  
Affidavits of jurors.*

Under s. 651 of the Criminal Code the venue for the trial of a person charged with an indictable offence may be changed to some place other than the county in which the offence is supposed to have been committed, if it appears to the satisfaction of the Court or Judge that it is expedient to the ends of justice, by reason of *anything* which may interfere with a fair trial in that county; it is not a question as to the jury altogether.

And where at a trial of the defendant, at which the jury disagreed, a crowd of persons congregated around the court house while the jury were deliberating, and endeavoured to intimidate the jurors and influence them in favour of the defendant, and afterwards made riotous demonstrations towards the Judge who presided at the trial, the venue was changed before the second trial.. .

Where affidavits were filed by the Crown to shew that the conduct of the crowd must have influenced the jurors, affidavits of jurors denying that they were intimidated were received in answer.

*L. G. McCarthy*, for the Crown.

*Wallace Nesbitt*, for the defendant.

[FALCONBRIDGE, J., 15TH FEBRUARY, 1899.]

*In re* McLEAN v. OSGOOD.

*Division Courts—Jurisdiction—Notice disputing—Extending time for—  
Mandamus.*

The Judge holding a Division Court has no power, after the expiry of the time limited by s. 205 of the Division

Courts Act, R. S. O. c. 60, for the giving of notice of intention to contest the jurisdiction of the Court, to grant leave to file such a notice.

Mandamus to Division Court granted.

*J. W. Winnett*, for the primary creditor.

*P. Mulkern*, for the primary debtor and garnishees.

### In the Fourth Division Court in the County of Perth.

[BARRON, Co.J., 30TH MARCH, 1899.]

#### FARRELL v. SCHOOL TRUSTEES OF SCHOOL SECTION No. 2, TOWNSHIP OF NORTH EASTHOPE.

*Equitable assignment—Order for payment of money —No designation of fund—Designation in another document.*

The plaintiff sued as assignee of one Stewart of an order in favour of Stewart from one Bell on the defendants for \$96.45, which order was in the following words: "Shakespeare, Sept. 29. \$96.45. To Trustees of S. S. No. 2, North Easthope. Please pay Mr. P. Stewart the sum of Ninety-six  $\frac{45}{100}$  Dollars and charge to my account. J. N. Bell." This document was given to Stewart enclosed in a letter to one of the trustees, which letter said, *inter alia*: "Will you kindly accept the enclosed order, and we can deduct it from my salary tomorrow, when we settle." This amount, \$96.45, was in fact owing to Bell for and on account of salary, and on no other account. After notice of the order and letter the trustees paid over the full amount of salary to Bell, on the pretence or belief that the absence of the year in the order absolved them from liability to Stewart.

*J. P. Mabee*, for the plaintiff.

*R. S. Robertson*, for the defendants.

BARRON, Co. J.—So far as the order of the 29th September is concerned, it is quite clear that it is simply a bill of exchange. It indicates no fund out of which the money is to

be paid, and in fact is less in favour of the holder of it than was the bill of exchange in favour of the plaintiff in the case of *Hall v. Prittie*, 17 A. R. 306, and of course I am bound by *Hall v. Prittie*, even though the fact be that there is no other fund out of which the money could be paid to Stewart than the salary: see *Bush v. Foote*, 58 Miss. 5; 3 Am. Rep. 310. But accompanying this order or bill of exchange, or whatever it may be, is a letter in which appear the words above quoted. It has been decided that a draft payable generally, operates as an equitable assignment where an intent to assign is shown by the correspondence accompanying the draft: *Throop Grain Co. v. Smith*, 110 N. Y. 83. Now the correspondence in evidence says, "to deduct the amount from salary." Hence the amount of the draft has to be payable out of salary and from no other source. In *Hall v. Prittie* the words "for flooring supplied," etc., were said to be a mere designation of the consideration for the debt owing from drawee to drawer. In this case the drawee is told specifically out of what fund the amount of the order is to be paid, viz., from salary. I therefore, hold that the order of the 29th September and the letter amount together to an equitable assignment.

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## MANITOBA.

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### In the Queen's Bench.

[DUBUC, J., 4TH APRIL, 1899.]

### MUSSEN v. GREAT NORTH-WEST CENTRAL R. W. CO.

*Chose in action—Assignment of—Beneficial interest—Action by assignee.*

The plaintiff was a servant of the defendants, and sued to recover the amount due him for salary, also as assignee of salaries due to several other servants of the defendants.

The assignment was made by a document under seal, duly executed. The accounts were proven by the pay rolls, and were stated to be correct by the chief engineer and auditor.

A question was raised as to whether the plaintiff was entitled to recover for the assigned accounts, as it was shown that they were assigned only for the purpose of authorizing the plaintiff to include them in his action. The defendants contended that the plaintiff had no beneficial interest in the accounts, and he could not sue upon them: *Wood v. McAlpine*, 1 A. R. 234.

*Held*, that the plaintiff was entitled to recover the full amount of his claim. There is no such provision in R. S. M. c. 1, s. 3, as there is in 35 V. c. 12 (O.), requiring that the assignee of a chose in action should have a beneficial interest therein at the time the action is brought.

*Henderson*, for the plaintiff.

*Cameron*, for the defendant.

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[BAIN, J., 29TH MARCH, 1899.]

### TETRAULT v. VAUGHAN.

*Assessment and taxes—Tax sale—Irregularities—Non-compliance with statute—Warrant dated before resolution of council—Advertisement—Defects—Curing clause—Assessment Act, s. 91.*

Issue under the Real Property Act. The plaintiff claimed the lands under a deed from the municipality of De Salaberry; the defendant claimed a half interest under a deed from the patentee from the Crown. The municipality held a sale of lands for arrears of taxes on the 8th August, 1893, and the land in question was purchased by the municipality. In April, 1895, a certificate signed by the reeve and secretary-treasurer was issued under s. 165 of the Assessment Act, vesting the land in the municipality. The certificate was registered in the Land Titles office, and the land was conveyed to the plaintiff by deed dated the 14th December, 1897.



The defendant contended that while the land was sold for the taxes of 1891 and 1892, the imperative directions of the statute had not been complied with in making the assessment and in imposing the taxes for 1891; therefore it was not legally charged with any taxes for that year. In March, 1891, the council passed a by-law enacting "that the part of the assessment roll for the year 1890 concerning the non-residents be adopted for the present year, and that the part of the assessment roll concerning the residents be not adopted, and that an assessor be appointed to make the said part of the roll not adopted by the council." An assessment roll was made of the property for which the roll of the previous year had not been adopted, and this land did not appear on the roll that was made.

A list of lands liable to be sold for taxes was produced, and attached to it was a warrant signed by the reeve directing the secretary-treasurer to levy upon the lands for the arrears of taxes. This warrant was dated the 23rd June, 1893; the only resolution of the council that there was directing the secretary-treasurer to prepare a list of lands liable to be sold for taxes was one dated the 3rd July, 1893; so the list produced was prepared and the warrant was made without authority from the council.

Two lists were prepared, but only one of them was authenticated, as the statute required, by the signature of the reeve and the seal of the municipality.

An advertisement that there would be a sale of the lands for taxes on the 8th August, by virtue of a warrant of the reeve dated the 23rd June, was published in the *Manitoba Gazette* of the 8th July, and in the *Winnipeg Free Press* of the 29th June. There was no newspaper published in the municipality; and the advertisement was inserted in the *Free Press* without any resolution of the council selecting it. The advertisement preceded the sale by more than thirty days. No resolution was passed by the council prior to the sale authorizing the reeve or any other member of the council to attend and bid at the sale.

*Held*, that the sale was a nullity. The numerous defects and omissions in the proceedings were not cured by s. 191 of

the Assessment Act, as amended by 55 V. c. 26, s. 7. The effect of such legislation being to remedy only irregularities, and not absolute nullities, it will not validate sales made on the basis of absolutely void proceedings: *Nanton v. Villeneuve*, 10 Man. L. R. 213, 14 Occ. N. 354; *Scott v. Imperial Loan Co.*, 11 Man. L. R. 190, 16 Occ. N. 197.

Verdict for the defendant with costs.

*Howell*, Q.C., for the plaintiff.

*Munson*, Q.C., for the defendant.

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[4TH APRIL, 1899.]

McFADDEN v. KERR.

*Attachment of debts—Trustee and cestui que trust—Trustee for sale of land—Equitable execution—Receiver.*

Application under Rule 425 on behalf of the defendant, the judgment debtor, to set aside an order attaching all debts owing or accruing from the garnishee to the judgment debtor, “and all claims and demands of the judgment debtor against the garnishee arising out of trust or contract, where such claims could be made available under equitable execution.”

It was contended that at the time the order was made and served there was no debt owing or accruing from the garnishee to the defendant, nor had he any claim or demand against the garnishee arising out of trust or contract which could be made available under equitable execution or otherwise, and there was nothing upon which such garnishing order could operate.

In October, 1893, the judgment debtor conveyed a quarter section of land to the garnishee by a deed, absolute in form, for the expressed consideration of \$1,800, which sum, less the amount of a mortgage on the land, the garnishee had paid to the judgment debtor; at the time the conveyance was made it was agreed that the garnishee would try to sell the land, and would pay to the judgment debtor whatever he should obtain for it over and above \$1,800.

*Held*, that under Rule 741 what was formerly a mere equitable debt can be attached as well as a legal one, but it would be impossible to hold that, in the circumstances of this case, there was any debt, equitable or legal, due or accruing from the garnishee to the judgment debtor. There was no debt due or owing, nor could it be said there was one accruing, for an accruing debt is one which, while it is not yet actually payable, will become payable in the future by reason of a present existing obligation: *debitum in præsentī, solvendum in futuro*.

In a trust of this kind, it would be impossible to say that the trustee is a debtor to his *cestui que trust* before he has the money which it would be his duty to pay over: *Webb v. Stenton*, 11 Q. B. D. 518.

It was argued that the case was one in which the Court under s. 39, s.-s. 11, of the Queen's Bench Act, would appoint some one on behalf of the judgment creditor to receive from the garnishee any moneys that would be payable from him to the judgment debtor on a sale of the land being effected, and, therefore, that the judgment debtor's equitable interest in the land might be attached.

Section 39, s.-s. 11, says that a receiver may be appointed in all cases in which it shall appear to the Court to be just or convenient, but it has been decided in England that the similar direction in the Judicature Act will not justify the appointment of a receiver in cases where one would not have been appointed before the Act: *Holmes v. Millage*, [1893] 1 Q. B. 551; *Harris v. Beauchamp*, [1895] 1 Q. B. 801. But, even if it be the case that the judgment creditor would be entitled to have a receiver appointed, that would not bring the case within the terms of the Rule, for the claims and demands referred to are those that could be made available by equitable execution at the suit of the judgment debtor himself, and not at the suit of the judgment creditor. The judgment debtor's claim or demand against the garnishee arising out of the relation between them as trustee and *cestui que trust* is not one that he would require equitable execution to make available. The judgment creditor might have other

remedies for availing himself of the debtor's interest in his land, but he could not reach it by garnishing the trustee.

Order rescinded; the defendant to have the costs of the application, to be set off against the amount of the plaintiff's judgment *pro tanto*.

*Hull*, for the plaintiff.

*Mathers*, for the defendant.

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## Exchequer Court of Canada.

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[BURBIDGE, J., 14TH DECEMBER, 1898.]

### HEMINGER v. THE "PORTER."

*Ship—Collision—Ordinary care—Contributory negligence—Evidence.*

Where a ship could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision, she ought to be held alone to blame for it, although the other ship may have been guilty of breach of some of the rules, but which breach did not contribute to the collision.

2. Where the defence of contributory negligence is set up by the defendant in an action for collision, he must show with reasonable clearness, not only that the other ship was at fault, but that her fault may have contributed to the collision.

*J. E. O'Connor*, for the appellant.

*H. Clay*, for the respondent.

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[16TH JANUARY, 1899.]

### INCHMAREE STEAMSHIP CO. v. THE "ASTRID."

*Ship—Collision—Extraordinary manœuvre—Burden of proof respecting.*

Where a collision had occurred, and where a manœuvre at the time of the collision is attributed by the plaintiff to the defendant of so extraordinary a character that it can only be accounted for by supposing that some mistake had

been made in giving an order, or in understanding the purport of a given order, the burden of proof as to such manœuvre is upon the plaintiff.

*R. C. Weldon*, for the appellants.

*A. Drysdale*, Q.C., for the respondent.

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### AMERICAN DUNLOP TIRE CO. v. GOOLD BICYCLE CO.

*Patent for invention—Infringement—Pioneer discovery—Evidence.*

Where one who says he is the inventor of anything has had an opportunity to hear of it from other sources, and especially where delay has occurred on his part in patenting his invention, his claim that he is a true inventor ought to be carefully weighed; but credit, under all the circumstances, ought to be given to the witnesses by whose evidence the claim is supported.

*Lash*, Q.C., *W. Cassels*, Q.C., and *A. W. Anglin*, for the plaintiffs.

*Osler*, Q. C., *J. G. Ridout*, and *James Ross*, for the defendants.

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[6TH MARCH, 1899.]

### REGINA v. BLACK.

*Crown bond—Validity—Primary obligation—Release of sureties—Laches of Government officials—Estoppel—Effect of 33 H. VIII. c. 39, s. 79.*

In a case arising in the Province of Quebec upon a post-master's bond, it appeared that the principal and sureties each bound himself in the penal sum of \$1,600, and the condition of the obligation was stated to be such that if the principal faithfully discharged the duties of his office and duly accounted for all moneys and property which came into his custody by virtue thereof, the obligation should be void. The bond also contained a provision that it should be

a breach of the bond if the postmaster committed any offence under the laws governing the administration of his office. It was objected by the sureties against the validity of the bond that it contained no primary obligation, the principal himself being bound in a penal sum, and that the sureties were not therefore bound to anything under the law of the Province of Quebec.

*Held*, (1) That there was a primary obligation on the part of the principal, inasmuch as he undertook to faithfully discharge the duties of his office, and to duly account for all moneys and property which might come into his custody. (2) That, as the bond conformed to the provisions of the Post Office Act, it was valid, even if it did not conform in every particular to the provisions of Art. 1131, C. C. L. C.

2. It was also objected that the bond did not cover the defalcations of the postmaster in respect of moneys coming into his hands as agent of the savings bank branch of the post office department.

*Held*, that it was part of the duties of the postmaster to receive savings bank deposits, and that the sureties were liable to make good all moneys so coming into his custody and not accounted for.

3. The sureties upon a postmaster's bond are not discharged by the fact that during the time the bond is in force the postmaster was guilty of defalcations, and that such defalcations were not discovered nor communicated to the sureties owing to the negligence of the post office authorities. Nor is the Crown estopped from recovering from the sureties in such a case by the mistaken statement of one of its officers that the postmaster's accounts were correct, and upon the strength of which the sureties allowed funds of the postmaster to be applied to other purposes than that of indemnifying themselves.

4. The Crown is not bound by the doctrine of *Phillips v. Foxhall*, L. R. 7 Q. B. 666, inasmuch as it proceeds upon the theory that failure by the obligee to communicate his knowledge of the principal's wrong-doing amounts to fraud, and fraud cannot be imputed to the Crown.

5. The statute 33 H. VIII. c. 39, s. 79, respecting suits upon bonds, is not in force in the Province of Quebec.

*E. L. Newcombe*, Q.C., and *T. H. Gisborne*, for the plaintiff.

*W. D. Hogg*, Q.C., and *Madore*, for the defendants.

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### COLPITTS v. THE QUEEN.

*Crown—Government railway—Accident to the person—Negligence—50 & 51 V. c. 16, s. 16—Undue speed.*

It is not negligence *per se* for the engineer or conductor of a train to exceed the rate of speed prescribed by the time-table of the railway. If the time-table were framed with reference to a reasonable limit of safety to any given point, then it would be negligence to exceed it; but *aliter* if it is fixed from considerations of convenience and not with reference to what is safe or prudent.

2. While in actions against railway companies the law is that the obligation of the company is to carry its passengers with reasonable care for their safety, and it is responsible only for injuries arising from its negligence; in actions against the Crown in respect of accidents to the person on Government railways, the liability of the Crown must be found exclusively within the provisions of 50 & 51 V. c. 16, s. 16, and the plaintiff cannot succeed unless he establishes that the injury he has sustained resulted from the negligence of some officer or servant of the Crown, while acting within the scope of his duties or employment upon such railway.

*Skinner*, Q.C., and *McRae*, for the suppliant.

*Pugsley*, Q.C., and *McAlpine*, for the respondent.

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[10TH APRIL, 1899.]

### SHULZE v. THE QUEEN.

*Revenue—Customs law—Breach—Importation—Fraudulent undervaluation—Trade discounts.*

Claimants were charged with a breach of the Customs Act by reason of undervaluation of certain manufactured



cloths imported into Canada. The goods were imported in given lengths, cut to order, and not by the roll or piece, as they were manufactured. The invoices on which the goods were entered for duty showed the prices at which, in the country of production, the manufacturer sells the uncut goods to the wholesale dealer or jobber, instead of showing the fair market value of such goods cut to order in given lengths, when sold for home consumption in the principal markets of the country from which they were imported. The values shown on the invoices were further reduced by certain alleged trade discounts, for which there was no apparent justification or excuse.

*Held*, that the circumstances amounted to fraudulent undervaluation of the goods, and that the decision of the Comptroller of Customs declaring the goods forfeited must be confirmed.

*W. D. Hogg*, Q.C., and *T. Dickson*, for the claimant.

*Fitzpatrick*, Q.C., S.-G., and *E. L. Newcombe*, Q.C., for the Crown.

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## ONTARIO.

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Supreme Court of Judicature.

### HIGH COURT OF JUSTICE.

[BOYD, C., ROBERTSON, J., 8TH APRIL, 1899.]

CANADA PERMANENT L. & S. CO. v. BALL.

*Principal and surety—Variation of contract—Giving time—Novation—Discharge of surety.*

A mortgage of leasehold lands to secure \$5,000, made by three executors under a will, recited such executorship and that the moneys were required for the purpose of the estate, the mortgage being under the Short Forms Act, and containing the usual covenant for payment by the mortgagors.

In 1888, under provision therefor in the will, a new executor was appointed, the defendant, one of the three executors, being released and all his interest vested in his successor and the other two executors. In 1882, while \$3,000 still remained due, the land being then greatly diminished in value and worth no more than the amount then due on it, the plaintiffs, with a full knowledge of all the facts, entered into an agreement under seal with the then executors for an extension of the time for payment of the principal, and though providing for a reduction of the rate of interest, also provided for its being compounded, and that it was to apply as well before as after maturity. The agreement contained a covenant by the then executors to pay the mortgage money, and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of the other parties in the said mortgaged premises, all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved. • —

*Held*, that, as between the acting executors and the one who had retired, there was constituted the relationship of principal and surety, and by virtue of the agreement in 1882 the latter was discharged; and further that it constituted a novation, which also effected a discharge.

*S. H. Blake, Q.C., and R. B. Beaumont, for the plaintiffs.*  
*James Reeve, Q.C., for the defendant Thompson.*

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[19TH APRIL, 1899.]

### JONES v. MASON.

*Summary judgment—Rule 603—Defence—Validity—Information and belief—Married woman—Separate estate—Foreign law.*

In an action upon a promissory note made in the State of New York, the defendants, who were husband and wife, in answer to an application for summary judgment under Rule 603, swore that the note was given upon a certain condition

which had not been fulfilled by the payees; that the defendants were informed and believed that the plaintiffs, the indorsees of the note, were suing for the benefit of the payees, and were not holders for value, or took it after maturity. The source of the information was not given. The plaintiffs positively denied that there was any notice of any condition. There was no proof that the wife had separate estate in Ontario, but the plaintiffs filed an affidavit made by a counsellor-at-law in the State of New York, who stated that by the laws there in force it was not necessary that a married woman should be possessed of any property, either real or personal, to enable her to contract or to make her contracts binding in law, her right to contract being the same as if she were unmarried. This affidavit was not contradicted.

*Held*, that no valid defence was shown, and the plaintiffs were entitled to summary judgment against both defendants.

*Bank of Toronto v. Keilty*, 17 P. R. 250, followed.

*Munro v. Orr*, 17 P. R. 53, distinguished.

*Masten*, for the plaintiffs.

*W. H. Blake*, for the defendants.

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[FALCONBRIDGE, J., STREET, J., 24TH APRIL, 1899.]

McEACHERN v. GORDON.

*Judgment debtor—Examination of—Assignment for benefit of creditors.*

The making of an assignment for the benefit of creditors does not deprive a judgment creditor of his right to examine a judgment debtor for the purpose of getting a *ca. sa.*, even if, perhaps, it may, in some cases, furnish a reason why an order for such examination should not be made.

Judgment of the County Court of Elgin affirmed.

*Gibbons*, Q.C., for the defendant, the appellant.

*E. D. Armour*, Q.C., and *W. L. McLaws*, for the plaintiff.

[MEREDITH, C.J., 25TH APRIL, 1899.]

## DOUGALL v. HUTTON.

*Local Judge—Jurisdiction—Injunction—Rules 46, 47.*

An appeal by the defendant from an order made by one of the local Judges for the county of Essex, restraining the defendant until the trial from carrying on the business of a grocer in the city of Windsor in alleged breach of a covenant with the plaintiff.

*J. H. Moss*, for the defendant, contended that, although the solicitors for both parties resided in the county of Essex, the local Judge had no jurisdiction to grant an injunction for more than eight days, citing *Kohles v. Costello*, 16 Occ. N. 84, decided on the 31st January, 1896, under the Rule then in force, 42 A. or 1419.

*R. U. Macpherson*, for the plaintiff.

MEREDITH, C.J., held that the local Judge had power to grant the injunction till the trial, *Kohles v. Costello* being no longer applicable, owing to changes made in the arrangement of the Rules. See Rules 46 and 47 of the present Consolidated Rules.

[FERGUSON, J., 17TH MARCH, 1899.]

## PULFER v. PULFER.

*Parent and child—Services of son on farm—Absence of contract or bargain—Wages—Quantum meruit.*

In an action by a son against his father for a declaration of his rights under an alleged agreement that, if he would return to his father's farm and remain, his father would "make it right" with him, and if he remained and assisted in working it, the farm should become his property, which agreement was found not proved on the evidence:—

*Held*, that, having continued on the farm in the hope that it might become his, although without any contract

or bargain to that effect, and he and his family having obtained their living off the farm, he could not recover for wages as on a *quantum meruit*.

*Justin*, for the plaintiff.

*A. McKechnie*, for the defendant.

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[24TH APRIL, 1899.]

### COPE v. CRICHTON.

*Equitable estate—Assignment of interest in land—Title—Right to possession—Subsequent mortgage—Notice—Registry laws—Limitation of actions—Commencement of statutory period—Tenancy at will.*

The plaintiff's father, being in possession of a farm under an unregistered agreement with a loan company for the sale thereof to him, assigned the agreement and all his interest thereunder by way of security to one who gave a bond to reassign upon payment of a small sum advanced. Neither the assignment nor the bond was registered. The money was repaid, but there was no reassignment. Subsequently, on the 3rd April, 1888, the father assigned all his interest in the land to the plaintiff for good and valuable consideration, the plaintiff having no notice or knowledge of the previous assignment. This assignment was duly registered. The plaintiff lived on the farm with his father and mother, whom he had covenanted to maintain during their lives, until July, 1888, when he went away, leaving his parents on the farm, with no definite agreement or understanding, but with the expectation, as he said, that they would remain on the place and make the last two payments under the original agreement, and that when this was done the place would be his. In February, 1891, the father mortgaged the land to the person who had made the first advance, to secure a larger sum, and the mortgage deed was registered. A few days later the loan company conveyed the land to the father, the purchase money having been paid in full, and the conveyance was registered. In February, 1892, the mortgagee died. In September, 1893, the plaintiff's father conveyed the land absolutely to the administrator of the mortgagee's estate, and this conveyance was also registered.

In an action against the administrator and the plaintiff's father to recover possession of the land and for a declaration that the last mentioned conveyance was void and a cloud upon the plaintiff's title:—

*Held*, that the assignment to the plaintiff in 1886 gave him an equitable estate in fee and the right to possession, and after its execution, the father and son both being on the place, the possession would be attributed to the son.

2. That the registration of that assignment constituted notice to the mortgagee, and the mortgage did not affect the plaintiff's title or right to possession.

3. That after the plaintiff went away in July, 1888, his father had possession under him as tenant at will, and his tenancy did not terminate until July, 1889, and therefore the Real Property Limitation Act had not barred the plaintiff's right at the time this action was begun in 1898.

4. That the plaintiff, having the equitable title and having the owner of the legal estate before the Court, was entitled to recover possession of the land.

*Shepley*, Q.C., for the plaintiff.

*W. R. Riddell*, for the defendant Crichton.

*J. E. Day*, for the defendant Cope.

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[ROSE, J., 25TH MARCH, 1899.]

### NEWALL v. MCGEE.

*Landlord and tenant—Lease for term of years—Provision for sale of land before termination of lease—Illegal entry by purchaser—Trespass—Incoming tenant.*

In a lease for five years, containing a covenant by the lessor for quiet enjoyment, the lessee agreed that if the place were sold and he should receive one month's notice prior to the expiration of any year, he would give up possession, and allow any incoming tenant to plough the land after harvest. Before the expiration of the lease the place was sold and conveyed to the purchaser, and an assignment of the lease made to him. In the autumn of the year, after the purchase was made, and before the lessee had harvested his crop, the

purchaser under protest from the lessee, entered on the land and ploughed it up, thereby causing injury to the lessee.

*Held*, that the purchaser was a tenant within the meaning of the covenant as to an incoming tenant, but that he had no right to enter on the property before the plaintiff had harvested his crop, and was therefore a trespasser and liable for damages caused thereby; but that no liability was imposed on the lessor under the covenant for quiet enjoyment, it not applying to a case of this kind.

*S. F. Washington*, for the plaintiff.

*A. Elliott*, for the defendant McGee.

*J. W. Elliott*, for the defendant Raynor.

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[24TH APRIL, 1899.]

*In re* JONES AND CITY OF LONDON.

*Municipal corporations—By-laws—Meeting of council—Notice of—Notice of introduction of by-laws—Reading by-laws—Adjournment of meeting.*

The notice calling a special meeting of the municipal council of a city at which two by-laws were passed regarding the number of tavern and shop licenses to be granted in the municipality, stated that it was “for the consideration of a by-law relating to tavern licenses.”

*Held*, a sufficient notice.

Remarks of Chitty, J., in *Henderson v. Bank of Australasia*, 45 Ch. D. at p. 337, referred to.

It was objected that notice of intention to introduce the by-laws should have been given, and that they should not have received their three readings in one day.

*Held*, that these were matters of internal regulation and subject to the decision of the mayor or chairman of the council, and the only appellate tribunal was the council.

The Municipal Act provides, s. 275, that “every council may adjourn its meetings from time to time.”

*Held*, that a meeting of the council might adjourn temporarily, without a formal notice to adjourn, by the consent of the majority of a quorum present; and, even if the adjournment in this case, announced by the mayor, was not

by the consent of the majority, the validity of an objection grounded on the absence of such consent would be so doubtful that the Court should not, in its discretion, quash the by-laws passed after the adjournment.

*Talbot Macbeth* and *G. N. Weekes*, for the applicant.

*T. G. Meredith*, for the city corporation.

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[STREET, J., 21st APRIL, 1899.]

### FLOWER v. MICHIGAN CENTRAL R. R. CO.

*Judgment—Motion for—Disagreement of jury—Rule 780—Scope of.*

Motion by defendants under Rule 780 for judgment in their favour after the disagreement of the jury in an action under Lord Campbell's Act. At the trial at Sandwich a motion for a nonsuit was refused on the ground that there was some evidence for the jury. The issue was whether the defendants had failed to give proper statutory signals at a level crossing where the plaintiff's husband was killed.

*D. W. Saunders*, for the defendants.

*F. A. Anglin*, for the plaintiff.

*Peters v. Perry*, 10 Times L. R. 366, *Casey v. Canadian Pacific R. W. Co.*, 15 O. R. 574, and *Bank of B. N. A. v. Eddy*, by Patterson, J.A., November, 1883, were referred to.

STREET, J., did not find anything in any of the cases referred to affording a definition of the limits of Rule 780. If he had been trying the case without a jury he would have dismissed the action upon the weight of evidence. But the Rule was not intended to give power to the Judge in every case in which a jury had failed to agree to determine it himself. If that had been the intention, a power should have been given him of deciding it in favour of either the plaintiff or the defendant, whereas the power given was only to dismiss the action. The Rule must be confined to cases in which after a trial by a jury and a disagreement, the Judge is of opinion that he should have withdrawn it from the jury.

Motion dismissed with costs to the plaintiff in any event.



## IN CHAMBERS.

[MEREDITH, C.J., 28TH APRIL, 1899.]

## HODGE v. HALLAMORE.

*Appeal—Lis pendens—Refusal to vacate—R. S. O. c. 51, s. 99.*

No appeal lies, by virtue of s. 99 of the Judicature Act, R. S. O. c. 51, or otherwise, from an order of a Master or Judge dismissing a motion made under s. 98 for an order vacating a certificate of *lis pendens*.

*W. R. Riddell*, for the plaintiff.

*J. R. Roaf*, for the defendants.

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[STREET, J., 24TH APRIL, 1899.]

*In re* DYER v. EVANS.

*Prohibition—Division Court—Jurisdiction—Application under R. S. O. c. 60, s. 200—Attachment of debts—Assignment for creditors—Effect of.*

Motion by the judgment debtor for an order of prohibition to the Judge and clerk of the 7th Division Court in the county of Middlesex and to the judgment creditor and the garnishee, to prevent the enforcement of a judgment obtained by the creditor against the garnishee in the Division Court for payment of \$53 out of a debt of \$105 due by the garnishee to the debtor, upon the ground that after the judgment recovered, but before payment of the amount, the debtor made an assignment for the benefit of his creditors, which, it was said, had the effect of superseding the judgment recovered by the creditor against the garnishee, by virtue of R. S. O. c. 147, s. 11.

The assignee made an application in the Division Court matter to the County Court Judge under s. 200 of the Division Courts Act, R. S. O. c. 60, for an order discharging the debt due from the garnishee to the debtor from the claim of

the creditor, upon the ground that it had been superseded by the making of the assignment, but the application was refused.

*Held*, that, as the Judge had jurisdiction to determine the motion under s. 200, prohibition did not lie.

Motion dismissed with costs.

*J. S. Robertson*, for the applicant.

*Talbot Macbeth*, for the primary creditor.

[BARRON, LOC.J., 27TH OCTOBER, 1898.]

# CRAWFORD v. TOWNSHIP OF ELLICE.

## KERR v. TOWNSHIP OF ELLICE.

## KERR v. TOWNSHIP OF ELLICE.

*Drainage—R. S. O. c. 226, ss. 93, 94—Jurisdiction of Drainage Referee—Notice of discontinuance—Power of local Judge to grant orders of reference under s. 94.*

Motion in each case for an order referring the action to the Drainage Referee under R. S. O. c. 226, s. 94.

*J. P. Mabey*, for the plaintiffs.

*G. G. McPherson*, for the defendants.

BARRON, LOC. J.—Each action is in damages, resulting from the non-repair of drains, which, it is alleged, the defendants have to keep in repair and maintain. In the Crawford action a mandatory order is asked for, requiring the defendants to maintain and keep the drain in order. The pleadings are closed.

It appears that proceedings were first taken under s. 93. The notice required by that section was served in due time. Applications were made before the Referee, who made certain orders. The plaintiffs, too, in such proceedings were examined. After this the plaintiffs served but did not file notice of discontinuance. This step was taken under s. 104 of the Act. The defendants set up that, by reason of this, the claims of the several plaintiffs are already in another forum—that the Referee is now seised of the claims; that

upon the trial this contention could be successfully urged in favour of dismissal of the actions, and therefore that I, as local Judge, have no jurisdiction. It is further said that the notice of discontinuance is not in effect such a notice, because the plaintiffs have not taken out an appointment to tax the defendants' costs, or at least have not permitted sufficient time to elapse to enable the defendants to do so.

The reason for requiring the plaintiff to wait is against the plaintiff, so as not to permit him to forestall the defendant, who first has the right to take out an appointment and tax costs; but I do not find that not waiting is to bar the plaintiff from bringing another action within the time he reasonably should wait for another and entirely different purpose. Nor is the notice less effectual, because the plaintiffs have not ascertained and paid the defendants' costs: see *Barry v. Hartley*, 15 P. R. 376.

Then, as to the objection that the claims of the plaintiffs are now in another forum, and that the Referee is seised thereof. It appears from the statement of claim in each case, that the claim is one in regard to which he, the Referee, has no jurisdiction except under s. 94, and that section has never been invoked to give and secure him jurisdiction. Under s. 93 the jurisdiction of the Referee is as to damages done "in the construction of drainage works, or consequent thereon." By the words "consequent thereon" is meant consequent upon the construction of drainage works. Now, these actions are not for such damage at all; but for damages arising since the construction "in not maintaining the drains." There is no fault found with the drains or their construction. *Per contra*, the drains and their construction are inferentially approved of, for in effect it is said, that which is a benefit you do not maintain as a benefit. Hence the Referee never had jurisdiction in these actions under s. 93, and I cannot see how, when he never had jurisdiction to hear and determine, his having proceeded is to prevent the Court or Judge making an order of reference under s. 94, which, but for this, he could do.

Then it is said that the Rules framed under the Judicature Act do not confer power upon me as a Local Judge of the High

Court of Justice in regard to another Act, the Drainage Act. I cannot agree with this contention. The words in the Rule "in all other motions, matters, and applications," give me, as local Judge, full power to make the order.

But I am embarrassed by the section itself; by the words "the Court or Judge" in the 12th line of the section (94). Am I the Judge or Court there mentioned? Clearly not, because I have no power to try the action. "The Court or Judge" there mentioned is the Court or Judge who, should no order be made, has jurisdiction to try these actions. Now, I have no jurisdiction to try these actions. Then, is not "the Court or Judge" mentioned in the 12th line, the Court or Judge mentioned in the 5th line, or rather *vice versa*? I think so. If I am not the one, I am not the other. I am clearly not the Court or Judge mentioned in the 12th line, for the Court or Judge there mentioned is the Court or Judge to try the case, and this I cannot do. I must therefore refuse to grant the order, but only on this last ground.

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## Supreme Court of Canada.

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QUEBEC.]

[22ND FEBRUARY, 1899.]

### HOLLESTER v. CITY OF MONTREAL.

*Municipal corporations—Expropriation proceedings — Delay — Interference with proprietary rights—Abandonment of proceedings—Damages—Servitudes—Public utility.*

Where an enactment, under which a servitude may be established for public utility, has made no provision for indemnifying the owners of lands thereby affected, an owner is not entitled to recover damages for the restriction of the enjoyment of his proprietary rights resulting from the establishment of such servitude.

Judgment of the Court below affirmed.

*Trenholme, Q.C., and Gilman, for the appellant.*

*Ethier, Q.C., for the respondent.*

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### SPRATT v. EDDY.

*Survey—Bornage—Concession line—Evidence.*

In an action *en bornage* between E., the owner of lots 7, 8, and 9 in the 10th concession of the township of Eardly, P.Q., and S., the owner of like numbered lots in the 9th concession, the question to be decided was the location of the line between the two concessions, E. claiming that it should be one straight line to be traced from the south-easterly angle of lot 14 in the 10th concession easterly on a course south 87 degrees, 30 minutes, east, to the town line between Eardley and Hull, while S. claimed that as to the lots in question it was about a quarter of a mile north of where the straight line would place it. A survey of part of the line was made in 1828, and of the remainder in 1850, and in 1892 the whole line was surveyed again, and the result was held by the Court below to establish it in accordance with the claim of E.

In 1867 there was a private survey which established the line further north as claimed by S., who contended that it, and not the survey of 1892, was a retracing of the original line.

*Held*, affirming the judgment of the Court of Queen's Bench, STRONG, C.J., dissenting, that the original surveys were made in accordance with the instructions to the surveyors, and established the straight line as the true concession line; that the survey in 1892 was the only one which retraced the original line in an efficient and legal manner; and that the evidence failed to support the contention that it was retraced in 1867, such contention depending on assumptions as to the manner in which the original surveys were made, which the Courts would not be justified in acting upon.

*Aylen*, for the appellant.

*Geoffrion*, Q.C., and *L. N. Champagne*, for the respondent.

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[25TH MAY, 1899.]

### ETHIER v. EWING.

*Appeal—Judgment of Court of Review—Appeal de plano to Privy Council—Supreme Court Act, 54 & 55 V. c. 25, s. 3—Final judgment.*

In proceedings by the city of Montreal for expropriation of land required for street improvement, objection was taken by interested ratepayers to one of the commissioners chosen to value the land, that he was related to the owner, and a petition for his recusation from the commission was presented to the Superior Court, and, after argument, dismissed. The judgment dismissing it having been affirmed by the Court of Review, an appeal was taken to the Supreme Court of Canada. On motion to quash such appeal:—

*Held*, that there would be no appeal *de plano* from the judgment of the Court of Review to the Privy Council, and consequently there was none to the Supreme Court, under 54 & 55 V. c. 25, s. 3.

*Held*, further, that the judgment of the Court of Review was not a final judgment, within the meaning of the Supreme and Exchequer Courts Act, R. S. C. c. 135, s. 29.

Appeal quashed with costs.

*Atwater*, Q.C., and *Ethier*, Q.C., for the motion.

*Lemieux*, Q.C., contra.

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BRITISH COLUMBIA.]

CANADIAN PACIFIC R. W. CO. v. McBRYAN.

*Water and watercourses—Adjoining lands—Injury to one property by water—Right of owner to guard against without regard to neighbour's rights.*

M. owned land bounded on one side by a river and on the other by land of the railway company. On the other side of the railway land was that of S., who was in the habit of irrigating it with water brought from a creek at some distance away. There was a slight depression from S.'s land to the river, and the water so used by S. ran across the railway land to the property of M., which was protected from injury by a dam which penned the water back, but not usually in sufficient quantity to damage the adjoining lands. In 1895 S. used much more water than usual for irrigation, and M.'s dam had to be raised to effectively prevent his land from being flooded, and the water sent back on the railway property caused considerable damage. The company brought an action against M. for damages and an injunction, which was twice tried: see 5 Brit. Col. L. R. 187. On the second trial the judgment for damages and an injunction was sustained by the full Court.

*Held*, reversing the last mentioned judgment, TASCHEREAU, J., *hæsitante*, that M. had a right to protect his land by all lawful means against the threatened injury without regard to any damage that might result to the adjoining land from the measures he adopted; and that the remedy of the company for the injury to their land was against S., the original author.

*Aylesworth*, Q.C., and *C. Wilson*, Q.C., for the appellant.

*S. H. Blake*, Q.C., for the respondents.

## Exchequer Court of Canada.

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[BURBIDGE, J., 4TH APRIL, 1899.]

### GRENIER v. THE QUEEN.

*Government railway—Death resulting from negligence of fellow-servant—Common employment—Widow and children—Right of action—Bar—Measure of damages.*

The doctrine of common employment has no place in the law of the Province of Quebec.

*Canadian Pacific R. W. Co. v. Robinson*, 14 S. C. R. 114, and *Filion v. The Queen*, 4 Ex. C. R. 134 and 24 S. C. R. 482, followed.

2. The widow and children of a person killed in an accident on a Government railway in the Province of Quebec have a right of action against the Crown therefor, notwithstanding that the accident was occasioned by the negligence of a fellow-servant of the deceased.

3. The right of action in such a case is given by Art. 1056, C. C. L. C., and is an independent one in behalf of the widow and children. It is not under the control or disposition of the husband, and nothing he may do in respect of it will bar the action.

4. Under the provisions of s. 50 of the Government Railways Act, while the Crown may limit the amount for which in cases of negligence it will be liable, it cannot contract itself out of all liability for negligence.

*Grand Trunk R. W. Co. v. Vogel*, 11 S. C. R. 612, and *Robertson v. Grand Trunk R. W. Co.*, 24 S. C. R. 611, applied.

5. In cases such as this it is the duty of the Court to give the widow and children such damages as will compensate them for the pecuniary loss sustained by them in the death of the husband and father. In doing that the Court should



take into consideration the age of the deceased, his state of health, the expectation of life, the character of his employment, the wages he was earning, and his prospects; on the other hand, the Court should not overlook the fact that out of his earnings he would have been obliged to support himself, as well as his wife and children, and the contingencies of illness or being thrown out of employment, to which in common with other men he would be exposed.

*Stuart*, Q.C., and *Riou*, for the suppliant.

*Fitzpatrick*, Q.C., S.-G., *Dunbar*, Q.C., and *Pouliot*, for the Crown.

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[10TH APRIL, 1899.]

### REGINA v. WALLACE.

#### *Expropriation—Tender—Sufficiency of—Costs—Mortgagees.*

Where the amount of compensation tendered by the Crown in an expropriation proceeding was found by the Court to be sufficient, and there was no dispute about the amount of interest to which the defendant was entitled, but the same was not tendered by the Crown, though allowed by the Court, costs were refused to either party.

2. Where mortgagees were made parties to an expropriation proceeding and they had appeared and were represented at the trial by counsel, although they did not dispute the amount of compensation, they were allowed their costs.

*J. M. Clark* and *A. W. Fraser*, for the Crown.

*M. O'Gara*, Q.C., and *Wyld*, for the defendant Wallace.

*John Bishop*, for the defendants the mortgagees.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

DIVISIONAL COURT.]

[9TH MAY, 1899.]

CITY OF TORONTO v. CANADIAN PACIFIC R. W. CO.

*Stay of proceedings—Action for rent—Pending reference as to title and other matters—Vendors and Purchasers' Act—Scope of reference—Leave to Appeal.*

The Court refused the plaintiffs leave to appeal from the decision of a Divisional Court, 18 P. R. 374, affirming an order staying proceedings in this action, deeming that the action was unnecessary.

*Robinson, Q.C., and Fullerton, Q.C., for the plaintiffs.*

*E. D. Armour, Q.C., and Angus MacMurchy, for the defendants.*

## SAUNDERS v. CITY OF TORONTO.

*Master and servant—Negligence—Municipal corporation—Independent contractor—Carter removing street sweepings.*

The relationship of master and servant does not exist between a municipal corporation and a teamster hired by them by the hour to remove street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of places from which and to which the sweepings are to be taken; and the municipal corporation are not liable for an accident caused by his negligence while taking a load to the designated place.

Judgment of a Divisional Court, 29 O. R. 273, 18 Occ. N. 136, reversed; Moss, J.A., dissenting.

*Fullerton, Q.C., for the appellants.*

*N. B. Gash, for the respondent.*

[11TH MAY, 1899.]

## REGINA v. CUSHING.

*Court of Appeal—Jurisdiction—Order quashing conviction.*

No appeal lies to the Court of Appeal for Ontario from an order of a Divisional Court quashing a conviction by a police magistrate for breach of a municipal by-law.

*MacKelcan*, Q.C., for the appellant.

*W. Nesbitt* and *J. G. Gauld*, for the respondent.

BOYD, C.]

[9TH MAY, 1899.]

## KIDD v. THOMSON.

*Ship—General average—Ice.*

A liability to general average contribution arises only where both ship and cargo are in imminent and untempered peril, and there is expenditure or sacrifice to secure their safety.

There is, therefore, no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such an occurrence is to be expected, ice forms in a harbour where a ship is lying in safety, and tugs are employed for the purpose of releasing her to enable her to complete her voyage.

Judgment of BOYD, C., reversed.

*W. R. Riddell* and *Glyn Osler*, for the appellants.

*J. W. Hanna*, for the respondents.

MEREDITH, C.J.]

SONS OF SCOTLAND BENEVOLENT ASSOCIATION v.  
FAULKNER.*Estoppel—Res judicata—Benevolent society—Dispute as to age of applicant.*

After an application for membership in a benevolent association had been accepted, a dispute arose as to the

applicant's age, and an action was brought by him to compel the association to issue to him a certificate of membership. This action was settled, the association accepting an affidavit of the applicant's brother as proof of his age, and thereupon issuing the certificate of membership. Subsequently the association brought this action asking for cancellation of the certificate, on the ground that the applicant's age was not in fact that stated by his brother.

*Held*, that nothing less than clear proof by the association of the actual age of the applicant, and of fraud in procuring and making the affidavit, would suffice to undo the settlement and entitle the association to cancellation of the certificate.

Judgment of MEREDITH, C. J., affirmed.

*Watson*, Q.C., and *J. J. Maclellan*, for the appellants.

*J. M. Clark* and *R. U. Macpherson*, for the respondent.

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*In re LAZIER.*

*Extradition—Forgery—Initiating prosecution.*

The prisoner, using an assumed name, represented himself to a shopkeeper to be a traveller for a certain wholesale firm, and, after going through the form of taking an order for goods, obtained the indorsement of the shopkeeper to a draft drawn by him in his assumed name on this firm, and this draft was then cashed by him at a bank:—

*Held*, that this was forgery, and that the prisoner should be extradited.

A prosecution under the Extradition Act may be initiated by any one who, if the offence had been committed in Canada, could put the criminal law in motion.

Judgment of MEREDITH, C.J., 30 O. R. 419, *ante* 72, affirmed.

*R. G. Smyth*, for the prisoner.

*P. J. M. Anderson* and *J. W. Curry*, for the prosecution.

## WARD v. CITY OF TORONTO.

*Landlord and tenant—Covenant for renewal or payment for improvements—Election—Notice.*

Under a covenant in a lease that if, at the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given the lessors thirty days' notice in writing of this desire, the lessors would renew or pay for improvements, the lessors having the right to elect, and the lessee must accept a renewal, unless before the expiration of the term the lessors elect not to renew.

Judgment of MEREDITH, C.J., 29 O. R. 729, 18 Occ. N. 360, affirmed.

*E. D. Armour*, Q.C., for the appellants.

*Fullerton*, Q.C., and *W. C. Chisholm*, for the respondents.

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FERGUSON, J.]

## KEEFER v. PHOENIX INSURANCE CO. OF HARTFORD.

*Fire insurance—Vendor and purchaser—Part interest.*

A person who has only a part interest in the subject-matter may insure for his own benefit to the full insurable value of that subject-matter, but in that event the policy must define in express terms the nature of the interest insured, and if there is any ambiguity the insured will be entitled to recover only the value of his own interest.

A policy issued to a vendor, who has received part of his purchase money, insuring the buildings on the land in question in a specified sum, with a proviso that the insurers are "to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage not exceeding in amount the sum or sums insured as above specified, nor the interests of the assured in the property herein described," does not cover more than the vendor's interest or enable him to recover for the benefit of himself and the purchaser the full value of the subject-matter.

Judgment of FERGUSON, J., 29 O. R. 394, 18 Occ. N. 176, reversed; MACLENNAN, J. A., dissenting.

*Aylesworth*, Q.C., and *G. L. Smith*, for the appellants.

*H. H. Collier*, for the respondents.

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ROSE, J.]

### WILSON v. BOULTER.

*Master and servant—Workmen's Compensation for Injuries Act—Defect in plant—Damages—Infant—Mother's services and expenditure.*

The infant plaintiff, who was employed in a canning factory, was injured by the explosion of a retort or boiler in which vegetables were being cooked. The cooking was done by steam, which was forced through the boiler, there being an intake pipe and escape pipe, which had to be adjusted by hand, and no safety valve or automatic escape pipe. There was no evidence of the cause of the explosion, and the defendants contended that it was due to a latent defect in the boiler.

*Held*, that it might properly be inferred that the explosion was caused either by the negligence of the person whose duty it was to adjust the escape pipe, or by the absence of the safety valve, and that in either view the defendants were liable.

Judgment of ROSE, J., affirmed.

*Held*, also, that the mother of the infant could not recover for her services in attending upon him during his illness and for moneys expended and liabilities incurred by her for medical attendance, nursing, and supplies, she not being in the legal relationship of master to him, or under legal liability to maintain him.

Judgment of ROSE, J., reversed.

*W. Nesbitt* and *Glyn Osler*, for the appellants.

*Clute*, Q.C., for the respondents.

SCOTTISH ONTARIO AND MANITOBA LAND CO. v.  
CITY OF TORONTO.

*Municipal corporations—Toronto waterworks—Purity of water—Injury to hydraulic elevator—Statutory obligation—Breach of contract.*

The corporation of the city of Toronto are bound by law to supply water from their system of waterworks to any inhabitant of the city who applies therefor and complies with the statutory conditions, and therefore no contractual relationship arises between the corporation and the consumer by reason of the application for water and the city's compliance therewith, and the corporation are not liable to the consumer, as upon a breach of contract to supply pure water, for injuries caused to his hydraulic elevator by sand in the water supplied.

Judgment of ROSE, J., 29 O. R. 459, 18 Occ. N. 263, affirmed.

*Langton, Q.C., and H. M. Mowat, for the appellants.*

*Robinson, Q.C., and Fullerton, Q.C., for the respondents.*

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[10TH MAY, 1899.]

*In re* SHAW AND THE CITY OF ST. THOMAS.

*Municipal corporations—By-law—Motion to quash—Time—Service of notice of motion.*

A summary application to quash a municipal by-law registered under s. 396 of the Municipal Act, R. S. O. c. 223, is "made," within the meaning of s. 399, when notice of the motion is served, the affidavits in support of it having been already filed; it is not necessary that the motion should be brought on for hearing within the time prescribed by the section.

*Re Sweetman and Township of Gosfield, 13 P. R. 293, approved.*

Decision of ROSE, J., affirmed.

*W. R. Riddell, for the appellants.*

*W. L. McLaws and T. A. Hunt, for the respondent.*

FALCONBRIDGE, J.]

[9TH MAY, 1899.]

## BIGGS v. FREEHOLD LOAN AND SAVINGS CO.

*Mortgage—Sale—Account—Trust—Limitation of actions—Interest—Acceleration clause.*

When a sale is effected under a mortgage made pursuant to the Manitoba Short Forms of Mortgages Act, which, like the Ontario Short Forms of Mortgages Act, provides that the mortgagee shall be possessed of and interested in the moneys to arise from any sale, upon trust to pay costs and charges and the principal and interest of the debt, and upon further trust to pay the surplus, if any, to the mortgagor, the mortgagee becomes an express trustee of the proceeds of sale, and the mortgagor is entitled to bring an action against him for an account, notwithstanding the expiration of six years from the time of sale.

Section 32 of the Trustee Act, R.S.O., c. 129, does not apply in such a case, because if there is a surplus it is trust money still retained by the trustee.

Judgment of FALCONBRIDGE, J., reversed.

A mortgage provided for payment of the principal money in two years from the date of the mortgage, with interest in the meantime half-yearly at the rate of nine per cent. per annum; that on default of payment for two months of any portion of the money secured, the whole of the instalments secured should become payable; and that on default of payment of any of the instalments secured at the times provided, interest at the said rate should be paid on all sums so in arrears.

*Held*, that the principal money was an instalment within the meaning of the proviso, and that interest at the rate of nine per cent. per annum was chargeable upon it after the expiration of the two years.

*J. Bicknell*, for the appellant.

*E. D. Armour*, Q.C., for the respondents.



MACMAHON, J.]

DUEBER WATCH CASE MANUFACTURING CO. v.  
TAGGART.

*Bankruptcy and insolvency—Assignment and preferences—Sale of assets—  
Extinguishment of debt.*

An assignment of the assets of a partnership was duly made pursuant to the provisions of the Assignments and Preferences Act, and the assignee, with the approval of the creditors, sold and transferred the assets to a nominee of the plaintiffs and two other creditors of the firm, in consideration of the payment to the other creditors of a composition, and subject to the claims of these three creditors. The purchaser covenanted with the assignee to settle the claims of these three creditors and to indemnify him therefrom.

*Held*, that the claims of these three creditors were thus made part of the purchase money, and were extinguished by the transfer of the assets.

Judgment of MACMAHON, J., affirmed.

*C. Millar*, for the appellants.

*Osler, Q.C.*, and *J. A. Mills*, for the respondents.

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STREET, J.]

FAWCETT v. FAWCETT.

*Benevolent society—Insurance—Change in rules—Creditors.*

In his application for membership in a benevolent society the applicant directed that the amount to which he should be entitled should be paid "subject to my will," and the certificate, issued in 1889, provided that at the death of beneficiary, if then in good standing, "his heirs and legal representatives shall be entitled to receive the amount collected upon an assessment not exceeding \$3,000, and he now directs that in case of his death the said sum be paid subject to his will."

The insured died on the 5th January, 1897, having on the 12th September, 1896, made his will, by which he directed his debts to be paid, and gave "all the rest and residue" of his estate to his wife, who survived him. At the time of the issue of the certificate there was no restriction in the rules of the society as to the person to whom payment could be made, and no provision as to payment in the event of an invalid appointment, but in July, 1896, new rules were passed, limiting the persons who could take as beneficiaries, and excluding expressly creditors and persons designated only by will.

*Held*, that the new rules did not affect certificates then existing, and that the insured's executors were entitled to the amount, fixed at \$1,500, for distribution among the insured's creditors.

Judgment of STREET, J., affirmed.

*Aylesworth*, Q.C., for the appellant.

*W. E. Middleton* and *J. F. Macdonald*, for the respondents.

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MEREDITH, J.]

WOOLLEY v. VICTORIA MUTUAL FIRE INSURANCE CO.

*Fire insurance—Mutual company—Assessment note—Default—Forfeiture.*

Default in payment of one of the deferred payments of the first instalment of a premium note given by an insurer in a mutual fire insurance company, under s. 129 of R. S. O. c. 203, does not, *ipso facto*, work a forfeiture.

A notice by the company to the insurer treating the payment as an assessment, and notifying him that in the event of non-payment the policy will be suspended, is not an assessment under s. 130, and non-payment pursuant to the notice does not suspend the operation of the policy.

Judgment of MEREDITH, J., affirmed.

*E. D. Armour*, Q.C., and *J. J. Scott*, for the appellants.

*Lynch-Staunton* and *W. L. Ross*, for the respondents.

## DRAINAGE REFEREE.]

*In re* TOWNSHIP OF RALEIGH AND TOWNSHIP OF HARWICH.*Drainage—Outlet—Drainage Act, 1894, s. 75.*

A drainage scheme under s. 75 of the Drainage Act, 1894, cannot be upheld if the engineer does not make provision for a sufficient outlet for the water dealt with.

Judgment of the Drainage Referee reversed.

*Aylesworth*, Q.C., and *J. B. Rankin*, for the appellants.

*M. Wilson*, Q.C., for the respondents.

## McKENZIE v. TOWNSHIP OF WEST FLAMBOROUGH.

*Drainage—Want of repair—Act of God.*

Where a drain is out of repair and lands are injured by water overflowing from it, the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall, unless it is shewn that, even if the drain had been in repair, the injury would have resulted.

Judgment of the Drainage Referee reversed.

*Lynch-Staunton* and *Logie*, for the appellants.

*Watson*, Q.C., and *A. R. Wardell*, for the respondents.

## IN CHAMBERS.

[OSLER, J.A., 3RD MAY, 1899.]

## YOUNG v. TUCKER.

*Appeal—To Supreme Court of Canada—Bond—Defect in form—Jurisdiction—Action begun in County Court—Removal into High Court—Report of Drainage Referee in action—Title to land—Servitude.*

Motion by the defendant for allowance of a bond on appeal to the Supreme Court of Canada.

*Held*, that the bond must be disallowed on the ground of substantial error in the form—"by" instead of "binds," in the operative part—which arose from following the form in Cassels's Supreme Court Practice, 2nd ed., p. 220, as recently pointed out in *Jamieson v. London and Canadian L. & A. Co.*, ante 162.

*Held*, also, that the action originated in the High Court, notwithstanding that it was removed in fact into that Court from the County Court by *certiorari*.

This was not a case like *Re Township of Raleigh and Township of Harwich*, the appeal in which to the Supreme Court was quashed in May, 1885, for want of jurisdiction. That was an appeal in a matter which originated in an appeal to the Drainage Referee from the report of an engineer for the purposes of a drainage by-law, while here the appeal to the Court of Appeal was from the report of the same Referee in an action.

*Held*, also, that, although the damages were no more than \$25, the title to some interest in real estate came in question as the result of the judgment, which in effect decided that the defendant was not entitled to the servitude to which he contended that the plaintiff's land was subject.

Order to go allowing the appeal upon filing a proper bond. Costs to the plaintiffs in any event.

*R. McKay*, for the defendant.

*Aylesworth*, Q.C., for the plaintiffs.

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## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 8RD MAY, 1899.]

### RANDALL v. ATKINSON.

*Evidence—Admissibility—Death of witness before cross-examination—Effect of—Manner of taking evidence—Signing depositions.*

When the old manner of taking evidence was that witnesses' answers were taken down in writing, read over for

the purpose of correction or explanation, and signed, the deposition was incomplete until signed, and could not be looked at as evidentiary; but, under the modern system of stenographic examination, the spoken word of the witness becomes the written word of the record and is complete as it progresses. Nothing is needed to authenticate it as far as the witness is concerned; at every stage of progress it is evidence as far as it goes; and where an examination in chief is not concluded when the witness dies, it will be received in evidence, but with less credit than is given to evidence adduced to rebut it.

Judgment of ROSE, J., 30 O. R. 242, *ante* p. 84, affirmed.

*W. M. Douglas*, for the plaintiff.

*Wallace Nesbitt*, for the defendant.

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[ARMOUR, C.J., STREET, J., 5TH JUNE, 1899.]

COPELAND BREWING CO. OF TORONTO v. BROOKS.

*Summary judgment—Rule 608—Dispute as to amount due—Power to give judgment.*

An appeal by the defendant William A. Brooks from an order of the Judge of the County Court of Victoria allowing the plaintiffs to sign final judgment for the amount of their claim in an action for the price of beer sold and delivered. The order was made before appearance, under Rule 608.

*J. H. Moss*, for the appellant, contended that the County Court had no jurisdiction over the cause of action, and also that it was not a proper case for Rule 608.

*E. D. Armour*, Q.C., and *Steers*, for the plaintiffs, *contra*.

THE COURT held that the Judge had no power to order a final judgment, the amount claimed not being in any way liquidated or ascertained, and being disputed by the appellant. The Judge might have directed a reference or inquiry to ascertain the amount due, and might have held

the motion over and given judgment after the ascertainment of the amount by such inquiry; but he could not give judgment and direct a reference by such judgment to ascertain the amount; that would be putting the cart before the horse.

Appeal allowed and order for judgment set aside with costs here and below to the appellant against the plaintiffs in any event.

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[BOYD, C., 24TH APRIL, 1899.]

STEWART v. OTTAWA AND NEW YORK R. W. CO.

*Railways—Expropriation of lands—"Owner"—Person in possession—Title—Jus tertii—51 V. c. 29, s. 103 (D.)*

By s. 103 of the Railway Act of Canada, 51 V. c. 29, the lands which may be taken without the consent of the owner shall not be more than 650 yards in length by 100 yards in breadth.

The defendants desired to use for their railway a tract of land more than 650 yards long of which the plaintiff was in possession, and they alleged that a strip in the middle of the tract was ordnance land of the Crown, and therefore sought to expropriate two pieces, one on each side of the alleged ordnance reserve, which latter the plaintiff claimed as his own by length of possession.

*Held*, that the scheme of the Act is that the company shall deal with the person in possession as owner, and if the company propose to disturb that possession, it must be pursuant to the powers conferred by the Act; the matter of title is to be held in abeyance until a later stage in the expropriation proceedings. The company cannot, even in the case of defective title, ignore the person who actually occupies the land as owner, and proceed as if his interest had been duly invalidated by legal process on the part of the real owner. Though part of the land be held by a precarious tenure, yet where there is possession of the whole as one property, there

should be but one set of proceedings and one arbitration, and the whole should be dealt with under the statute as the property of one and the same owner.

*Osler*, Q.C., and *Wyld*, for the plaintiff.

*D'Arcy Scott*, for the defendants.

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[25TH APRIL, 1899.]

CLAPPERTON v. MUTCHMOR.

*Bankruptcy and insolvency—Proof of claim—Promissory note—Indorser—Incomplete instrument—Suretyship—Maturity after assignment for creditors.*

The plaintiffs, being creditors of an incorporated company, accepted an offer made by the company's president, in a letter addressed to the plaintiffs, to "personally guarantee payment" of the company's debt, upon an extension of time being given, and, in order to carry out the arrangement, promissory notes were made by the company payable to the order of the plaintiffs, and indorsed by the president, who made an assignment for the benefit of his creditors under R. S. O. c. 147, before the maturity of three of the notes, in respect of which the plaintiffs sought to rank upon his estate in the hands of the defendant as assignee.

*Held*, following *Jenkins v. Coomber*, [1898] 2 Q. B. 168, that, as against the Statute of Frauds, no action could be maintained upon the notes against the president, as to whom the instrument was incomplete.

And, although the correspondence and the notes taken together establish an agreement of suretyship, notwithstanding the Statute of Frauds, yet proof could not be made upon such a contract when the notes guaranteed had not matured at the date of the assignment.

*Grant v. West*, 23 A. R. 533, and *Purefoy v. Purefoy*, 1 Vern. 28, followed.

*Belcourt* and *R. V. Sinclair*, for the plaintiffs.

*G. F. Henderson*, for the defendant.

[ARMOUR, C.J., 28TH APRIL, 1899.]

## BREWSTER v. HENDERSHOTT.

*Church—Change in doctrine—Secession of members—Religious Institutions Act.*

In 1885, under the powers conferred by the Religious Institutions Act, certain land was acquired in trust for a religious body called "The United Brethren in Christ," whereon a church was erected at the expense of the individual members of the congregation. In 1889 a schism occurred, in consequence of a change of faith, though not a fundamental one, as held by the Court of Appeal in *Itter v. Howe*, 23 A. R. 256, 16 Occ. N. 158, the congregation of this church adhering to the old faith. Subsequently, at the yearly conference of the body, and also at the quarterly conference of the circuit in which this church was, resolutions were passed purporting to appoint as trustees the plaintiffs, who were adherents of the new faith, in the place of the defendants, who were survivors of the original trustees and those appointed by the congregation in the place of those deceased. The plaintiffs claimed possession of the land, and also asked for a declaration that they were the owners in trust for the Brethren.

*Held*, that the legal estate in the lands was vested in the defendants; that the plaintiffs failed to prove title thereto; and the defendants were therefore entitled to retain the possession thereof; and the declaration of ownership asked for by the plaintiffs was refused.

*German*, for the plaintiffs.

*Couper*, for the defendants.

[FERGUSON, J., 24TH APRIL, 1899.]

## COPE v. CRICHTON.

*Counterclaim—Relief against co-defendant—Striking out—Costs—Pleading to counterclaim—Waiver.*

One of the defendants, in an action brought to recover possession of land and to set aside a conveyance of the land



from him to his co-defendant, delivered with his statement of defence a counterclaim against his co-defendant for relief upon the covenants contained in the conveyance attacked and in a prior mortgage deed, but sought no relief against the plaintiff in that regard, and did not serve a third party notice upon his co-defendant. The latter pleaded to the counterclaim, but at the trial moved to strike it out, and, after an expression of opinion from the trial Judge, the counterclaiming defendant submitted to have it struck out.

*Held*, that the co-defendant was entitled as against the counterclaiming defendant to such costs as he would have been entitled to upon a successful motion to strike out the counterclaim.

*Held*, also, that the fact of his having pleaded to the counterclaim did not militate against his rights.

*J. E. Day*, for the defendant John Thomas Cope.

*W. R. Riddell* and *A. Fasken*, for the defendant Crichton.

[FALCONBRIDGE, J., 20TH MARCH 1899.]

### HASTINGS v. SUMMERFELDT.

*Parliamentary elections—Provincial Legislature—Deputy returning officer—Spoiled ballot paper—Showing ballot paper and refusing to give new one—Breach of duty—Penalty.*

The plaintiff, a Conservative, to the knowledge of the defendant, a deputy returning officer and Liberal, in marking his ballot inadvertently marked it for the Liberal candidate, against whom, however, he intended to vote. He immediately, and before he had left the apartment set apart for marking ballots, informed the defendant of his mistake, and asked for another ballot paper, but the defendant said he must first see the ballot paper, which the plaintiff at first refused to allow him to do, but, on the Conservative scrutineer recommending him to do so, he handed it to the defendant, without creasing or folding it so that it might be placed in the ballot box, but so that those present could not see how it was marked. The defendant looked at it, and then either showed it or placed it in such a manner

that it could be seen and was seen by all present except one person, and, contending that it was not a spoilt ballot, contrary to the plaintiff's protest, placed it in the ballot box, and it was counted for the person against whom the plaintiff intended to vote.

*Held*, that the defendant, by his acts in disclosing how the plaintiff marked his ballot paper, in not cancelling it, and in refusing to give the plaintiff another ballot paper on his demanding one, and by his action compelling him to vote for the candidate whom he wished to oppose, was guilty of breaches of duty which entitled the plaintiff to judgment in his favour for the penalties provided for by the statute.

*Ritchie*, Q.C., and *J. Greer*, for the plaintiff.

*T. M. Higgins*, for the defendant.

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#### IN CHAMBERS.

[ROSE, J., 17TH APRIL, 1899.]

#### *In re* WILSON.

*Will—Devise—Power of appointment—“By will or otherwise”—Disposition by will—Invalidity of bequest—Validity of execution of power.*

A widow, having a power of appointment under her husband's will, in the words “my said wife shall have full power to dispose of by will or otherwise,” by her will devised all her real and personal estate to her executors “in trust to convert the same into cash” and pay legacies, and as to the rest and residue to convert into cash and “divide the proceeds among friends, relatives, and labourers in the Lord's work according to the judgment of my executors.”

*Held*, that the disposition made clearly indicated an intention to take the property dealt with out of the instrument containing the power for all purposes, and not only for the limited purpose of giving effect to the particular disposition expressed; but that the residuary bequest was void

as too indefinite: and that the executors took the property in trust for the next of kin *of the appointor*, and not beneficially.

*A. Fasken*, for the executors.

*W. Davidson*, for the objects of the residuary bequests in the will.

*H. E. Rose*, for the next of kin of the husband.

*A. J. Boyd* and *Goldwin L. Smith*, for the next of kin of the testatrix.

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## NEW BRUNSWICK.

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In the Supreme Court.

IN EQUITY.

[BARKER, J., 28TH MARCH, 1899.]

JONES v. BREWER.

*Specific performance—Agreement to give bill of sale.*

Specific performance will be decreed of an agreement to give a bill of sale upon ascertained and specific furniture sold and delivered upon credit in reliance upon such agreement.

*Ruel*, for the plaintiff.

*Wallace* and *G. H. V. Belyea*, for the defendant.

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[18TH APRIL, 1899.]

ATKINSON v. BOURGEOIS.

*Bankruptcy and insolvency—Preference—13 Eliz. c. 5.*

Under 13 Eliz. c. 5 an insolvent debtor may transfer property to one creditor with the effect of giving him a preference over other creditors and defeating executions about to

be issued against the property at the instance of such creditors, if the transfer is for valuable consideration, and is not a cloak to retain an interest in the property for the benefit of the grantor.

*W. B. Chandler*, for the plaintiff.

*A. A. Stockton*, Q.C., for the defendants.

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### SCHOFIELD v. VASSIE.

*Will—Construction—Income payable to trustees for maintenance of children  
—Children living with father—Income payable to father.*

A testator by his will gave his estate to trustees in trust to pay over the net income for the maintenance and education of the children of his son until the youngest became of age. The children, of whom some were of age, lived with their father.

*Held*, that the income should be paid to the father while the children were maintained and educated by him, though he was amply able to maintain and educate them out of his own means.

*A. I. Trueman*, for the trustees.

*Earle*, Q.C., and *Pickett*, for the father.

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[12TH MAY, 1899.]

### McPHERSON v. GLASIER.

*Costs—Application of fees on common law side of Court to suits in equity.*

A fee for which no provision is made in the equity table of fees is to be the same as that allowed for a like service under the Supreme Court Act, 60 V. c. 24, and is not now regulated by the common law table of fees provided by C. S. N. B. c. 119.

*C. E. Duffy*, for the plaintiff.

*F. St. John Bliss*, for the defendant.

## MANITOBA.

## In the Queen's Bench.

[BAIN, J., 27TH APRIL, 1899.]

## UNGER v. LONG.

*Service of papers—Attorney's office closed—Time from which service to count  
—Conduct money—Payment of.*

Application for an order for attachment against the plaintiff under Rule 390 of the Queen's Bench Act, 1895, on the ground that he had been guilty of a contempt of Court in not attending to be examined before a special examiner.

Rule 382 requires that the party examining shall serve a copy of the appointment upon the solicitor of the party to be examined at least 48 hours before the examination.

The appointment was for the 7th April at 2.30 p.m., at Winnipeg. The plaintiff's solicitor lived in Gretna, and had his office there; he stated that on the 5th April he was absent from his office and it was locked up until 5 o'clock in the afternoon, and when he returned to it at that time he found the copy of the appointment pushed under the door.

The person who was employed to effect the service stated that he left the copy of the appointment at the solicitor's office before twelve o'clock noon.

*Held*, that leaving a paper at the office of a solicitor is not service unless it has been given to some person in the office, and that when a notice is merely left at the office service will count only from the time when it is found: *Stratton v. Hawkes*, 3 Dowl. 25; *McCallum v. Provincial Ins. Co.*, 6. P. R. 101.

The direction of Rule 381 is that "the party to be examined upon being served with a subpoena and upon payment of the proper fees," shall attend and submit to examination. The plaintiff lived in Gretna, and it was shown that a person living in Gretna could not attend an examination in Winnipeg at 2.30 p.m. and return to Gretna in less than two days. The plaintiff was entitled to \$8.30 for railway fare and attendance; he was paid with the subpoena \$6.83.

Payment of the proper fees was a condition precedent of the obligation of the party to attend on the subpoena.

Application dismissed with costs to the plaintiff in the cause; the fees already paid to the plaintiff to be applied on his fees for a future appointment.

*Mathers*, for the plaintiff.

*C. H. Campbell*, Q.C., for the defendant.

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[29<sup>TH</sup> MAY, 1899.]

LONDON AND LANCASHIRE LIFE ASSURANCE CO.  
v. BAGSHAWE.

*Principal and agent—Commission—Insurance premiums—Notes taken for premiums subsequently dishonoured—Construction of contract.*

By an agreement in writing between the plaintiffs and defendant, the defendant became a general agent of the plaintiffs for the purpose of canvassing for insurance.

The defendant was to receive a commission of fifty-five per cent. of all full first premiums on ordinary plans.

Paragraph 3 provided that "all premiums shall be paid in cash or notes approved by the company as authorized and on the official forms furnished; and the agent shall not receive payment for premiums or renewals thereof in any other manner."

Paragraph 12 contained a stipulation that "notes shall not be regarded as payment of premium except during their currency."

The plaintiffs sued to recover a balance due them on an account stated.

The defendant claimed to be entitled to charge the commission of fifty-five per cent. on the notes that were taken for the premiums on the insurance he wrote, whether the notes had been paid or not.

*Held*, that the defendant was not entitled to have commission on the amount of notes that had been dishonoured; if the commission had been credited or allowed to him on such notes while they were current, he was to be charged back with it, if they were dishonoured.

Judgment for the plaintiffs.

*Howell*, Q.C., and *Machray*, for the plaintiffs.

*Wilson* and *Baker*, for the defendant.

## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[2ND JUNE, 1899.

#### WALKER v. GURNEY-TILDEN CO.

*Appeal—Order of Divisional Court—Question of costs arising in Chambers—  
Leave to appeal—Solicitor—Lien—Settlement—Fruits of litigation*

An appeal does not lie to the Court of Appeal, unless by special leave, from an order of a Divisional Court made upon appeal from an order in Chambers enforcing a solicitor's lien for costs.

Leave to appeal from the decision of a Divisional Court, 18 P. R. 274, 18 Occ. N. 401, refused, that decision appearing to be in accordance with well-established practice.

*Washington*, for the plaintiff's solicitors.

*Shepley*, Q.C., for the defendants.

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#### ELGIE v. BUTT.

*Costs—Set-off—Interlocutory costs—Solicitor's lien—Rule 1165—Judgment  
—Order for set-off—Necessity for.*

The costs of a motion, and appeals following, to discharge the defendant out of custody under an order for arrest before judgment, are properly interlocutory costs, though partly incurred after judgment; and where such costs are awarded

to the defendant, they ought to be set off against the judgment which the plaintiff has obtained against the defendant in the action, and which the defendant is unable to pay. As against such set-off, the defendant's solicitor has no lien on the costs which the plaintiff has been ordered to pay, and such costs may be ordered to be set off or deducted, as provided in Rule 1165.

In this case the order allowing the defendant costs was not made until after judgment, and therefore an application to the Court for a direction to set off was necessary; had the order been made before judgment, the taxing officer would have made the deduction.

*J. H. Moss*, for the plaintiff.

*W. M. Douglas*, for the defendant.

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### REGINA v. REID.

*Appeal—Order of Divisional Court quashing conviction—Constitutional question—Certificate of Attorney-General—R. S. O. c. 91, s. 3—Inadvertence—Quashing appeal—Costs.*

The Attorney-General certified his opinion, pursuant to s. 3 of R. S. O. c. 91, that the decision of the High Court quashing a conviction made under an Ontario statute involved a question on the construction of the British North America Act, and an appeal from such decision was brought on in the regular way; but, as it plainly appeared to the Court of Appeal that the decision involved no such question, and the certificate of the Attorney-General appeared to have been granted inadvertently, in consequence of an authentic copy of the reasons for the judgment of the Court below not having been brought before him, the appeal was quashed, and with costs to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a *qui tam* action.

*A. E. O'Meara*, for the appellant.

*DuVernet*, for the defendant.

*J. R. Cartwright*, Q.C., for the Attorney-General.



## IN CHAMBERS.

[MOSS, J. A., 17<sup>TH</sup> JUNE, 1899.]*In re* TORONTO RAILWAY CO. AND CITY OF  
TORONTO.*Appeal—Court of Appeal—Assessment appeal—Notice of—Non-prosecution—  
Motion to dismiss—Rules 790, 821, 822.*

Notice of an appeal to the Court of Appeal, under s. 84 (6) of the Assessment Act, R. S. O. c. 224, against the decision of a board of County Court Judges with respect to a municipal assessment, was served by the municipality upon the railway company whose assessment was in question, but the motion was not set down to be heard nor proceeded with in any way.

Upon motion by the railway company for an order dismissing the appeal:—

*Held*, that the appeal, by force of s. 84 (6), was lodged in the Court of Appeal in like manner as an appeal from a decision of a County Court in an ordinary action becomes lodged—when the proper proceedings have been taken—in a Divisional Court, in which case Rule 790 or Rules 821 and 822 applied, and a motion to dismiss was unnecessary; or, if not, that the appeal was not in the Court of Appeal at all, and no order could be made.

*J. Bicknell*, for the railway company.

*H. L. Drayton*, for the city corporation.

## HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 1<sup>ST</sup> MAY, 1899.]

## McMILLAN v. McMILLAN.

*Will—Devise—Estate in fee—Cutting down—Estate in tail.*

A testator by his will provided as follows: “Thirdly, I give and devise to my son A. and his heirs and assigns forever . . . the south half of lot 23 . . . Fourthly, it is my

will and desire, provided my son A. shall have no lawful heir or children, that . . . the south half of lot 23 . . . after his death that my son D. shall have it, with all the right and title that my son A. had to it heretofore, provided that my son D. will come and take possession of the same six months after my son A.'s death. . . . Fifthly, I will and bequeath to my beloved wife the use of all my stock of cattle and personal property; it is my will likewise that she will have the use of the east half of the south half of lot 23 . . . during life to remain on the premises, on which she shall be entitled to reside during her life. After her decease my will is that the same shall belong to my son A., his heirs and assigns forever."

After the testator's death his widow remained in possession of her half, and A. took possession of the remainder, which he retained until his mother's death, after which he occupied the whole until his own death. A. never had any children, but he made a will devising all his real and personal estate to his wife, the defendant M.

D., the plaintiff, demanded possession within six months, but it was refused by the defendant M.

*Held*, that under the third clause of the will A. took an estate in fee simple, which was, by the fourth clause, cut down to an estate tail, with remainder in fee to D.; but that the fifth clause gave a life estate in half the property to the testator's widow, with a remainder in fee to A.; and that, therefore, the plaintiff and the defendant were each entitled to a half in fee simple.

Judgment of ROBERTSON, J., varied.

*D. B. MacLennan*, Q.C., for the defendant Margery McMillan.

*R. Smith*, for the plaintiff.

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[BOYD, C., FERGUSON, J., ROBERTSON, J., 2ND MAY, 1899.]

### REGINA v. APPELBE.

*Municipal corporation—By-law—"Transient traders"—Occupation of premises—Quashing conviction.*

A by-law of a city corporation provided that "no person not entered upon the assessment roll of the city of W. . . . or

who may be entered for the first time in the said assessment roll . . . and who at the time of commencing business . . . has not resided continuously in said city . . . at least three months, shall commence business . . . for the sale of goods or merchandise . . . until such person has paid to . . . the sum of . . . by way of license."

*Held*, that the provisions of the statute under which it was framed, R. S. O. c. 223, s. 583, s.-ss. 30 and 31, relate to transient traders *who occupy premises* in a municipality, and that clause (b) of s.-s. 31, defining the term "transient traders," does not modify the practice as to the occupation of the premises; and that this by-law was defective and invalid, as it was directed merely against persons not entered upon the assessment roll, who had resided continuously for three months in the municipality, and was quite silent as to these persons being in occupation of premises; and a conviction made thereunder was quashed.

*Regina v. Cuthbert*, 45 U. C. R. 24, and *Regina v. Caton*, 16 O. R. 13, followed.

*Aylesworth*, Q.C., for the defendant.

*W. M. Douglas*, for the prosecutor.

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[MEREDITH, C.J., ROSE, J., 1ST JUNE, 1899.]

DENIER v. MARKS.

EARLE v. MARKS.

*Security for costs—Residence out of Ontario—"Ordinarily resident"—Rule 1198 (b)—Discretion.*

It is not a ground for refusing to order a plaintiff resident out of the jurisdiction to give security for the defendant's costs, that the defendant himself resides out of the jurisdiction.

Rule 1198 provides that security for costs may be ordered, "(b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario."

*Held*, ROSE, J., *dubitante*, that these words refer to a person who, under ordinary conditions or circumstances, is

habitually present in some country or place out of Ontario; and that a person who has no home, and whose calling causes him to be as much in Ontario as elsewhere, cannot be said to come within this branch of the Rule.

The discretion which the Court has in making or withholding an order for security for costs should be exercised against making an order which would shut the doors of the Court against a plaintiff.

*J. H. Moss*, for the plaintiffs.

*W. H. Blake*, for the defendant. †

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[ARMOUR, C.J., STREET, J., 6TH JUNE, 1899.]

McCARRON v. METROPOLITAN LIFE INS. CO.

*Appeal—County Court—Setting down—Time—Extension—R. S. O. c. 55, s. 57—Rule 353.*

Motion by the plaintiff to quash the appeal of the defendants from a judgment of the County Court of York, upon the ground that it was not set down for argument at the first sittings of a Divisional Court which commenced after the expiration of one month from the judgment complained of, as required by s. 57 of the County Courts Act, R. S. O. c. 55. †

The Judge of the County Court had, upon the *ex parte* application of the defendants, made an order purporting to extend the time for setting down the appeal, and had refused an application made by the plaintiff to rescind such order.

*Hislop*, for the plaintiff.

*F. S. Mearns*, for the defendants, relied on the order of the Judge, and also asked the Court, if necessary, to extend the time, under Rule 353. †

THE COURT held that the appeal having been set down too late, the Court had no power to hear it, nor had the Court or the Judge below power to extend the time, Rule 353 not in terms or by inference applying so as to enable the Court to extend the time limited by the statute.

An order was made quashing the appeal with costs.

[7TH JUNE, 1899.]

## SMITH v. HAY.

*Appeal—County Court—Certificate of Judge—Absence of—Setting down—Invalidity of—Time—R. S. O. c. 55, ss. 55, 57.*

Motion by the plaintiff to quash the appeal of the defendant from the judgment of the County Court of Stormont, Dundas, and Glengarry, on the ground that the appeal was improperly set down, the pleadings and proceedings in the Court below not having been certified by the Judge, as required by s. 55 of the County Courts Act, R. S. O. c. 55.

*C. H. Cline*, for the plaintiff.

*W. A. D. Lees*, for the defendant, asked to be allowed to obtain a certificate from the Judge and lodge it *nunc pro tunc*, and to have the setting down thereupon taken as regular.

THE COURT held that the appeal could not be considered as set down at all, because the proceedings were not certified, as required by s. 55 of the County Courts Act, R. S. O. c. 55; and, as s. 57 required that the appeal should be set down within a particular time, it would be useless to allow the proceedings to be certified now, as the appeal would have to be set down anew, and the time for setting down had now elapsed.

An order was made quashing the appeal with costs.

[BOYD, C., 5TH JUNE, 1899.]

## CORY v. LEMOINE.

*Settlement of action—Pending reference—Duty of Master—Dispute as to terms of settlement—Finding—Report—Opening up—Costs*

Pending a reference to take accounts, a settlement was made between the parties, in the absence of their solicitors, but there was a dispute as to the terms of the settlement. The Master gave the parties the alternative, on the suggestion of the plaintiff, either to go on so as to determine whether the settlement did in fact end the matters in litigation, or to go on with the accounts as if there had been no settlement. The defendants, however, refused to take any further part in the proceedings in the Master's office. The Master found the fact of a settlement, and also that the

defendants had agreed to pay the plaintiff's costs as part of the settlement, which the defendants disputed.

*Held*, on appeal from the Master's report, that it was competent for him to deal with the question whether there was or was not a settlement, and report according to the result. The course taken by him was according to the proper practice and within the scope of his jurisdiction. The decisions as to staying proceedings, upon summary application, in case of a compromise, are not necessarily applicable to a compromise arrived at pending a reference. By Rule 667, in taking accounts the Master is to inquire, adjudge, and report as to all matters relating thereto as fully as if the same had been specifically referred.

The defendants, however, should not be prejudiced by their having withheld before the Master any evidence to support the settlement in the terms which they asserted; and therefore the report should be opened up on payment of costs.

*Wyld*, for the plaintiff.

*Latchford*, for the defendant.

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[STREET, J., 25TH MAY, 1899.]

### TELFER v. BROWN.

*Principal and agent—Business carried on in name of agent—Lease of premises to agent—Surrender—New lease to agent and others—Notice to landlord—Liability—Injunction—Parties—Declaration of right—Damages—Depreciation of stock—Depriving principal of value of term.*

One of the defendants was in 1893 employed by the plaintiffs as the manager of a shop which they supplied with goods; his brother, another defendant, was soon afterwards employed in the same shop under him, and both continued for five or six years to sell the plaintiffs' goods for them in the shop as hired clerks, and in no other capacity. At the time the arrangement was first made, a lease of the shop for three years was obtained from the third defendant, in the name of the first defendant, manager of the shop, and, although the lease was never formally renewed, the possession remained unchanged as long as the brothers remained in the plaintiffs' employment. The business was carried on in the name of the first defendant, the manager, and he held the lease of the shop for the plaintiffs, his employers. In December,

1898, a fire occurred in the shop, and the building and stock were damaged, and shortly afterwards the two brothers and another brother obtained a new lease of the shop from the landlord, the third defendant, at an increased rental. This was at first kept secret from the plaintiffs; for a time the brothers continued to sell the damaged stock in the same shop; but in January, 1899, the remainder of the stock was moved to other premises pending repairs, and the manager gave notice of his intention to leave the plaintiffs' employment. The brothers having declined a business offer made by the plaintiffs, they were dismissed from the plaintiffs' employment, and told that they must not do their business upon the premises in question, as the plaintiffs claimed them. At the commencement of this action and while it was pending the three brothers, the lessees, were in possession of the shop, carrying on business in it in their own names.

*Held*, that the action must be dismissed as against the defendant landlord, as he had, upon the evidence, no such notice of the relations between the parties as to make him liable for having made the new lease.

The conduct of the other two defendants in obtaining the new lease over the head of their employers during the continuance of their employment was wrong; but, in the absence from the record of the third partner and lessee, these defendants could not be enjoined from carrying on business in the shop, and to declare them trustees for the plaintiffs of their two-thirds of the term, would be of no avail to the plaintiffs.

Nor could the plaintiffs recover damages for the depreciation in the value of their stock by reason of their being prevented from continuing their business in the shop in question after the damage by fire had been made good, for they could have obtained another shop in the neighbourhood. The damage was really caused by the defendants leaving their service; but this they had a right to do upon a month's notice, and no damages could be given on that head.

The original tenancy began in April, 1893, and ended in April, 1896. From that time forward it was a yearly tenancy, and the plaintiffs really were the tenants, though the manager was the nominal tenant. When he wrongfully

surrendered his tenancy in January, 1899, the plaintiffs were entitled to hold until April, 1900, because no valid notice could have been given to terminate the tenancy earlier; and he was bound to account to the plaintiffs for the value of the term which he surrendered, or to pay damages for having deprived the plaintiffs of it, which was practically the same thing, the measure being the difference between the old and new rental for a period of fifteen months.

*Dornford v. Dornford*, 12 Ves. 127, and *Heydon v. Castle*, 15 O. R. 257, 261, referred to.

*Birnie*, for the plaintiff.

*G. W. Bruce*, for the defendants Thomas N. Brown and George Brown.

*W. T. Allan*, for the defendant Burdett.

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### SHEARD v. HORAN.

*Damages—Warranty of title—Sale of machine—Contemplated profits from use of.*

The defendant company in 1893 sold a hay press to their co-defendant upon credit, and upon the terms that the property should remain in them until payment. The contract was properly filed under s. 6 of 51 V. c. 19, now s. 3 of R. S. O. c. 149. A few months afterwards the purchaser resold the press to the plaintiff, who had no knowledge of the facts, and was told that it was paid for and free from any lien. After the plaintiff had used it for nearly four years, during which the original purchaser had made some small payments on account, the defendant company seized it in the plaintiff's possession under the terms of the contract.

*Held*, that the plaintiff was entitled to recover from his vendor, upon a warranty of title which he proved, the value of the press and the sum he would have received beyond expenses upon contracts actually made to press hay with the press in question and which he was in course of executing at the time of the seizure, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale.



*The Argentine*, 14 App. Cas. 519; *Cory v. Thomas Iron Works Co.*, L. R. 3 Q. B. 181; and *Mullett v. Mason*, L. R. 1 C. P. 559, followed.

*Birnie*, for the plaintiff.

*Shepley*, Q.C., for the defendant company.

*W. A. J. Bell*, for the other defendants.

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### IN CHAMBERS.

[ARMOUR, C.J., 16TH JUNE, 1899.]

#### HOFFMAN v. CRERAR.

*Judgment—Default—Writ of summons—Special indorsement—Nullity—Abandonment of action—Joint contractor—Release of some after judgment—Effect of—Costs—Amendment—Execution.*

The writ of summons was indorsed with a claim for \$404 for services rendered and money expended for the defendants, indicating the nature of the services and of the expenditure, but not the items:—

*Held*, not a special indorsement, and that there was no right to sign final judgments thereon for non-appearance of certain of the defendants, and the judgments which the plaintiff purported to sign were nullities, and the plaintiff, by proceeding against the other defendants without taking any warranted proceedings against the defendants who did not appear, must be taken to have abandoned his action against them.

The cause of action was a joint one against thirty-one defendants. Twelve of them did not appear, and judgments were signed against these for the full amount claimed. The other nineteen appeared, and as against them the action proceeded to trial, and judgment was given for the plaintiff against these defendants for \$116. An appeal by these nineteen defendants was allowed as to eleven of them, but dismissed as to eight. After this the plaintiff made an agreement with the twelve defendants against whom judgments had been signed for default, that upon each defendant paying to the plaintiff the sum of \$10, such defendant should be released from all liability in respect of the plaintiff's cause of action against him.

*Held*, that, as the release occurred after judgment against the defendants who had appeared, it could not be pleaded in the action; but, as the action was for a joint liability of the defendants who did not appear and of those who failed in appeal, and the plaintiff never had any claim against these defendants for any sum but \$116, and the plaintiff had been paid by or had agreed to accept from the defendants who failed to appear a larger sum, \$120, it would be inequitable that the plaintiff should be permitted to enforce his judgment against the defendants who failed in appeal.

*Held*, also, that the plaintiff, after the judgment in appeal, should have amended the judgment below in accordance with the certificate of the Court of Appeal, and that the costs in the Court of Appeal should have been added to the costs of the action, and only one execution issued thereon.

*D. L. McCarthy*, for the plaintiff.

*J. H. Moss*, for the defendants.

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## MANITOBA.

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### In the Queen's Bench.

[FULL COURT, 18TH JUNE, 1899.]

BANK OF HAMILTON v. GILLIES.

BANK OF HAMILTON v. MURRAY.

*Promissory note—Form of—Conditions attached—Special agreement—Bills of Exchange Act, 1890, s. 82, s.-s. 3.*

The question in these cases was whether the instruments sued on were negotiable promissory notes, transferable by indorsement.

One of the documents was in the following form:—

\$50.

Winnipeg, Sept. 9th, 1892.

On the 1st day of February, 1894, for value received, I promise to pay to Anderson & Calvert, or order, at their office, Winnipeg, Man., \$50, with interest at 7 per cent., and 12 per cent. after due until paid.

And if the undersigned shall sooner dispose of, sell, or attempt to sell the undermentioned land which he owns, the same to be payable on demand at said office. It is agreed and understood that the title, ownership, and property for

which this note is given does not pass from the vendors, Anderson & Calvert, until this note and any others given on account thereof are paid in full, with interest. If this note is not paid at maturity, the vendors may take possession of the machinery for which it is given, and sell the same at public or private sale, the proceeds, less the expenses, to be applied on the note, which action shall be without prejudice to the right of the vendors to forthwith collect the balance remaining unpaid.

The land owned by me being ——— of section No. ———, range No. ———; number of acres ———.

(Signed) Andrew Gillies.

It was conceded that the provision for accelerating the time of payment did not affect the character of the instrument: *Elliott v. Beech*, 3 Man. L. R. 213.

Two objections were taken: first, that the mere setting out of the further agreement prevented the document as a whole from being treated as a promissory note; secondly, that the further clause really qualified the positive nature of the preceding promise to pay.

The Judge of the County Court considered the decision in *Merchants Bank v. Dunlop*, 9 Man. L. R. 623, 14 Occ. N. 115, as decisive of the cases, and gave judgment for the plaintiffs. The defendants appealed.

*Held*, that what were added in the present instances were direct and express statements of agreements by the signers of the documents upon matters wholly separate from the promise to pay. The provisions could not be treated as "a pledge of collateral security with authority to sell or dispose thereof," within the meaning of s. 82, s.-s. 3, of the Bills of Exchange Act, 1890. The word "pledge" in the sub-section should not be construed in a narrow sense, but it seemed wholly inapplicable to an agreement respecting the passing of property upon a sale of chattels: *Prescott v. Garland*, 34 N. B. Reps. 291.

*Held*, also, following *Kirkwood v. Smith*, [1896] 1 Q. B. 582, that the instruments sued on were not negotiable promissory notes, and that the indorsements gave to the plaintiffs no title to sue upon them.

Appeals allowed with costs. Nonsuits to be entered in the County Court with costs of the actions.

*Howell*, Q.C., and *Mathers*, for the defendants.

*Ewart*, Q.C., and *Crawford*, Q.C., for the plaintiffs.

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[KILLAM, J., 26TH MAY, 1899.]

DAY v. RUTLEDGE.

*Execution—Costs of—Rule 683—Poundage—Appeal to Supreme Court of Canada—Judgment of—Entry in Court below—Costs of.*

After a judgment in favour of the plaintiff had been affirmed by the full Court, the plaintiff's costs were taxed, and writs of *fi. fa* and certificate for registration issued the same day.

A demand, for the costs, not including the costs of the executions, was made, and after three days the executions were placed in the sheriff's hands and the certificate registered.

Subsequently on payment of the costs into Court pending an appeal to the Supreme Court of Canada, the executions were set aside, the question of sheriff's fees being reserved.

In the Supreme Court the appeal was dismissed with costs, and the judgment of the Supreme Court was entered in the judgment book of this Court on a Judge's fiat.

An application was made for payment, out of the moneys in Court, of the costs of the executions, and certificate, poundage, and costs of the fiat.

*Held*, that Rule 683 of the Queen's Bench Act, 1895, authorized the issue of execution *instantly* upon the perfecting of a judgment or order: *Clarke v. Creighton*, 14 P. R. 34.

Poundage should not be allowed out of the moneys in Court. It is not generally understood to be covered by the word "fees."

The proceedings for making the judgment of the Supreme Court a judgment of this Court were not necessary.

*Mulock*, for the plaintiff.

*Wilson*, for the defendant Lawlor.

## Supreme Court of Canada.

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ONTARIO.]

[80TH MAY, 1899.]

### KERVIN v. CANADIAN COLOURED COTTON MILLS CO.

*Master and servant—Negligence—Workman's death—Dangerous machinery—Statutory duty—Cause of accident—Evidence—Jury—Conjecture.*

K., a workman in a cotton mill, was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident, and it could not be ascertained how it occurred. In an action by his widow and infant children against the company, the negligence charged was want of a fence or guard around the machinery which caused the death of K., contrary to the provisions of the Workmen's Compensation Act.

*Held*, reversing the judgment of the Court of Appeal, 25 A. R. 36, 18 Occ. N. 47, and of a Divisional Court, 28 O. R. 73, 16 Occ. N. 374, GWYNNE, J., dissenting, that, whether the omission of such statutable duty could or could not form the basis of an action at common law, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident.

*Osler*, Q.C., and *R. A. Pringle*, for the appellants.

*Aylesworth*, Q.C., and *C. H. Cline*, for the respondent.

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NEW BRUNSWICK.]

### NORWICH UNION FIRE INS. CO. v. LEBELL.

*Fire insurance—Application—Ownership of property insured—Misrepresentation.*

A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy, it should be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation,

or occupancy of the property, or any omission to make known a fact material to the risk, would avoid the policy. In the application for the policy the insured stated that he was sole owner of the property to be insured and of the land on which it stood, whereas it was, to his knowledge and that of the sub-agent who secured the application, situated upon the public highway.

*Held*, reversing the judgment of the Supreme Court of New Brunswick, that, as the application was more than once referred to in the policy, it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition.

*Wallace Nesbitt and C. J. Coster*, for the appellants.

*J. B. M. Baxter*, for the respondent.

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BRITISH COLUMBIA.]

HOBBS v. ESQUIMALT AND NANAIMO R. W. CO.

*Contract—Sale of land—Unilateral mistake—Reservation of minerals—Specific performance.*

The defendants executed an agreement to sell certain lands to the plaintiff, who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him, which he refused to accept, as it reserved the minerals on the land, though the agreement was for an unconditional sale. In an action for specific performance of the agreement, the defendants contended that in their conveyances the word "land" was always used as meaning land minus the minerals.

*Held*, reversing the judgment of the Supreme Court of British Columbia, 6 Brit. Col. L. R. 228, TASCHEREAU, J., dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake; and he was entitled to a decree for specific performance.

*W. R. Riddell*, for the appellant.

*Hogg, Q.C., and Marsh, Q.C.*, for the respondents.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

Divisional Court.]

[29<sup>TH</sup> JUNE, 1899.

## MURPHY v. PHENIX BRIDGE CO.

*Writ of summons—Service on foreign corporation—Business within Ontario  
—Servant—Agent—Rule 159.*

Order of a Divisional Court, 18 P. R. 406, *ante* 167, reversed, and order of MEREDITH, C.J., *ib.*, restored.

*W. H. Blake*, for the appellants.

*Mulvey*, for the respondents.

Bord, C.]

[2<sup>ND</sup> JUNE, 1899.

## COLQUHOUN v. MURRAY.

*Limitation of actions—Mortgage—Arrears of interest—Acknowledgment.*

Upon the sale of a property which was subject to mortgage, the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee indorsed upon the mortgage, and signed, a memorandum fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser.

*Held*, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that, as against an incumbrancer claiming

under the purchaser, the mortgagee was entitled to only six years' arrears of interest.

Judgment of BOYD, C., reversed.

*J. H. Moss*, for the appellant.

*D. W. Saunders*, for the respondent.

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IN CHAMBERS.

[Moss, J. A., 30TH JUNE, 1899.]

CONFEDERATION LIFE ASSOCIATION v. LABATT.

*Appeal—Court of Appeal—Stay of execution—Security for damages—Rule 827 (2).*

An application by the defendant for an order under Rule 827 (2), that, notwithstanding the pendency of the appeal of the MacWillie Company, third parties, execution should not be stayed as regards the damages awarded against them, or at all events as regards the sums of \$160 and \$282.25, part thereof, or that the MacWillie Company should be directed to give security for the damages.

The motion was made upon two grounds: (1) that the company had no assets, and had discontinued business; (2) that the company did not on the appeal dispute their liability to the defendant to the extent of \$160; in other words, that they admitted the propriety of the judgment in favour of the plaintiffs against the defendant, but disputed that they were liable to indemnify the defendant beyond the sum of \$160.

The sum of \$282.25 represented the costs of the plaintiffs paid by the defendant. The appeal of the company was in form an appeal against the judgment in favour of the plaintiffs, as well as against the judgment of indemnity in favour of the defendant, but the reasons for appeal indicated that the company were relying chiefly on the ground that their liability to the defendant ought to be limited to \$160.

*Held*, that security is not to be required from the appellant for damages, unless, upon an application showing special circumstances, the Court otherwise orders.



*McCormick v. Temperance and General Life Assurance Co.*, 17 P. R. 175, followed.

An application under Rule 827 (2) is not sufficiently supported by showing that the appellant does not appear to be presently possessed of assets immediately available under execution. But in this case the allegation of want of assets was displaced, and it was not shown that any fraudulent or improper disposition of the assets spoken of had been attempted or contemplated.

As to the second ground, the defendant was not willing to accept the \$160 in full of his claim against the company, but insisted upon the full measure of the judgment in his favour. It might be that, should the company succeed in their appeal to any extent, there would need to be a readjustment of not only the amount of damages, but also of the costs for which the company had been made responsible. It could not be said at present that the company must in any event be ordered to pay \$160 to the defendant, for there might be deductions or off-sets. The defendant was not in any immediate danger from inability to enforce his judgment.

Motion refused with costs to the company in the appeal.

*Rowell*, for the defendant.

*W. H. Irving*, for the MacWillie Company.

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## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., 16TH JUNE, 1899.]

### LEEMING v. ARMITAGE.

*Judgment—Setting aside—Fraud—Procedure—Petition—Action—Rule 642.*

In this action the plaintiff alleged a wrongful interference with his property under a judgment obtained against him by the defendant by fraud in a former action in the High Court of Justice for Ontario, and his claim was to have the judgment set aside and to recover damages for the wrong.

Rule 642 provides that a party entitled to impeach a judgment on the ground of fraud shall proceed by petition in the cause.

*Held*, that the provisions of the Rule were not applicable to this case, and were only applicable and imperative, if imperative at all, in a simple case where no consequent relief is sought, or, if sought, where it may be granted upon the petition in the original action.

*Teetzel*, Q.C., for the plaintiff.

*Monro Grier*, for the defendant.

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[ARMOUR, C.J., STREET, J., 17TH JUNE, 1899.]

EVES v. BOOTH.

*Dower—Husband and wife—Separation deed—Trustees—Covenant as to release of dower—Construction of.*

In 1868 the plaintiff and her husband, and trustees on her behalf executed a deed which contained an agreement for separation of the husband and wife, a conveyance of certain property by the husband for the benefit of the wife, and a number of covenants, one of which was as follows: "And the parties of the third part"—the trustees—"hereby covenant that the said Jane Eves"—the plaintiff—"will, whenever called upon, release her dower in any lands of which he, the said James Eves"—the husband—"may hereinafter (*sic*) acquire a title." The other covenants were expressed to be on behalf of or with the heirs, executors, and administrators of the husband.

In an action by the plaintiff against the executrix of her husband's will, for dower in his after-acquired lands:—

*Held*, that this covenant was a part of the consideration for the benefits the plaintiff received under the deed, and which she had ever since continued to enjoy, and, although she did not personally covenant, yet, as the covenant was entered into by her trustees on her behalf, and she was a party to and executed the deed containing it, she was bound

by her recognition of and assent to it, and it would be contrary to equity to permit her to maintain the action.

*George Wilkie*, for the plaintiff.

*A. Hoskin*, Q.C., for the defendant.

*J. E. Irving*, for a defendant by counterclaim.

[20TH JUNE, 1899.]

## QUICK v. TOWNSHIP OF COLCHESTER SOUTH.

*Equitable assignment—Designation of funds—Alternative—Notice—Agreement.*

A contractor, having done work under his contract with the defendants and having brought an action against them for the contract price and for extra work, gave the plaintiff the following order:—

“S. Baltzer, Esq., Reeve Col. South.

Please pay William Jackson Quick the sum of \$100 on account of my contract on the Richmond drain outlet.”

Nearly a year afterwards—the action having been in the meantime referred and another action brought by the contractor against the defendants for damages for overflowing his land—he gave the plaintiff a second order, as follows:

“To the Reeve, Deputy Reeve, and Councillors of Colchester South.

Sirs—Will you kindly pay to W. J. Quick the sum of \$144.25, and chg. to my contract on Richmond drain outlet or damage suit.”

Shortly after this, the referee made his report finding \$139.40 to be due to the contractor, after deducting money paid by the defendants before action and the amounts of certain orders given by him in favour of a number of persons, not including the plaintiff.

Each party having appealed from the report, a settlement of both actions was agreed upon and carried out, by which, *inter alia*, the balance of \$139.44 was to be applied towards payment of the defendants' costs of the action for damages. Before the making of the agreement the defendants had notice of both the orders given to the plaintiff.

*Held*, that both the orders were good equitable assignments; the second being an assignment either of the specific funds, and the defendants being bound to treat it as an assignment of the one which did arise. The agreement, carried out as it was, established conclusively that the defendants were indebted to the contractor in \$139.44, and, having had notice of the orders before the agreement, they were bound to apply that sum to them, instead of in the manner provided in the agreement.

Judgment of the County Court of Essex affirmed.

*F. A. Anglin*, for the plaintiff.

*Aylesworth*, Q.C., for the defendants.

[28<sup>RD</sup> JUNE, 1899.]

*In re* ONTARIO MUTUAL LIFE ASSURANCE CO. AND  
FOX.

*Executors and administrators—Life insurance policy—Domicil of insured—Possession of policy—Assignment—Foreign administrator—Domestic administrator—Domestic insurance company—Administration—Foreign creditors—Agreement—Construction.*

The insurance company, having its head office in Ontario, insured the life of a person domiciled in Ontario, by two policies, one for \$2,000 and the other for \$3,000, payable to his executors or administrators at his death, at such head office. These policies were assigned by the insured to certain persons in Ontario, and an agreement in writing was subsequently made between the insured and these persons, by which his indebtedness to them was settled by his giving two promissory notes for \$500 each, and by which it was also provided that the policies should be re-assigned to the insured "upon the payment . . . of the first of the said \$500 promissory notes, and shall in the meantime be held as collateral security for the payment of the said \$500 note . . . and the said (insured) shall be bound to keep up all premiums in the meantime, and if not paid when due, the said premiums may be paid by (the assignees), and the payments so made shall be added to said (insured's) indebtedness, to which said policies shall remain as collateral security therefor."

The insured died in a foreign country, where he had been for some time domiciled, having in his actual possession, at the time of his death, one of the policies.

Letters of administration to his estate were granted by a Court in the country where he died, to a person there, and also by a Surrogate Court of Ontario to one of the assignees of the policies.

*Held*, that, although the locality of a specialty is where it is conspicuous at the time of the death, that means, where it is rightly conspicuous, and, as the assignees were entitled in law to the possession of the policy, it was conspicuous, not where it actually was at the death, but where it rightly ought to have been; and the rule that the locality of a specialty is the jurisdiction in which letters of administration are to be granted is subject to this qualification—if the specialty can be recovered and enforced in the country where it is found at the death; and, assuming that letters were properly granted by the foreign Court, the policy could not have been enforced and the moneys payable thereby, recovered in the foreign country, for the insurance company, being as to that country a foreign corporation, and not doing business therein, could not be sued there.

The appointment of an administrator in Ontario was, therefore, necessary; and the insurance company having paid the insurance moneys into Court, they should be handed over to that administrator to be administered. The foreign creditors of the insured could not be prejudiced by this administration, for they would be entitled to file their claims and rank equally with the Canadian creditors.

*Held*, also, that, upon the true construction of the agreement, the assignees were entitled only to the amount of the first one of the promissory notes, with interest from its maturity, and to the amount of the premiums paid by them since the date of the agreement, with interest.

*W. E. Middleton* for the claimants *R. & J. Fox and John Fox*.

*McEvoy*, for the claimants *Trimble and Stevens*.

[BOYD, C., ROBERTSON, J., 22ND JUNE, 1899.]

FOSTER v. TORONTO R. W. CO.

*Trial—Good Friday—Statutory holiday—Dies non.*

It was contended by the plaintiff that the trial having been concluded on Good Friday, the judgment was a nullity.

*Held*, that, while in England there are many days declared to be *dies non juridici*, the same as Sunday, in this Province the only day on which no judicial act can validly be done is the Lord's Day or Sunday. This does not result from Sunday being a statutory holiday, but because it is *dies non juridicus*, as declared by early canons of the church, adopted or confirmed by English Kings, and so incorporated into the common law, and as such introduced into this Province. Christmas, Good Friday, and the like, are holidays by statute, but they are not on the same footing as to separateness from ordinary or secular work as the Lord's Day, nor are they regarded as religious occasions by a great part of the population. Though the Rules of Court sanction and provide for the closing of the offices on holidays, this is merely for the benefit of the officers, and does not make void any business done on those days.

The decisions as to what may and may not be done on Sundays are not relevant to the question in this case, which turns upon the effect of going on with the trial of a case on Good Friday, both counsel consenting and the jury desiring it. That is a perfectly proper and competent thing to do as far as legal validity of the proceedings is concerned. The presiding Judge will not, of course, interfere with the wish of any one to attend Divine worship on that day, but, all parties interested consenting, there is no want of jurisdiction to proceed with the trial to its conclusion.

W. R. P. Parker, for the plaintiff.

J. Bicknell, for the defendants.

## IN CHAMBERS.

[STREET, J., 28<sup>RD</sup> JUNE, 1899.]

## COX v. PRIOR.

*Discovery—Examination of party resident out of Ontario—Order for—Enforcement—Member of Parliament—Attachment—Striking out defence—Rules 443, 454, 477.*

Where a defendant resides out of Ontario, and is only in it for a temporary purpose, his attendance to be examined or discovery can only be obtained, under Rule 477, by a Judge's order upon notice, and not by appointment under Rule 443.

An order was made under Rule 477 for the examination in Ontario of a defendant who resided in British Columbia, and who was temporarily in Ontario attending the meetings of the House of Commons of Canada, of which he was a member.

Although this order could not be enforced by attachment against the defendant while the House of Commons was in session, in the event of his refusing or neglecting to attend, it could be enforced, under Rule 454, by striking out his defence.

*Watson, Q.C.*, for the plaintiff.

*R. McKay*, for the defendant Prior.

[THE MASTER IN CHAMBERS, 12<sup>TH</sup> MAY, 1899.]

## MAIR v. CAMERON.

*Writ of Summons—Renewal—Withholding of evidence—Statute of Limitations.*

Where orders were made from time to time renewing a writ of summons, and it appeared that the plaintiff all the time knew, but did not disclose, where the defendant could be served, and the Statute of Limitations had, but for the renewals, barred the plaintiff's claim, the orders were rescinded, upon an application by the defendant made under Rule 358, after the orders had come to his knowledge.

*Doyle v. Kaufman*, 3 Q. B. D. 7, 340, and *Hewett v. Barr*, [1891] 1 Q. B. 98, followed.

*W. M. Douglas*, for the plaintiff.

*D. O. Cameron*, for the defendant.

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## NOVA SCOTIA.

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### In the Supreme Court.

[GRAHAM, E.J., JUNE, 1899.]

#### RYAN v. CALDWELL.

*Mortgage—Action on covenant—Opening sale under decree—Foreclosure.*

Action by mortgagees against mortgagor on the covenant for payment in the mortgage, for the balance due after crediting the amount for which the property was sold under foreclosure.

The mortgagor had conveyed away his equity of redemption before the foreclosure, and was not made a party to the foreclosure action.

The plaintiffs bid in the premises at the foreclosure sale for less than was due on the mortgage, and subsequently re-sold them, and the property was now owned by a third party.

*Held*, that the case was distinguishable from *Kenny v. Chisholm*, 7 R. & G. 497, on the ground that the defendant was not a party to the foreclosure proceedings, and that the defendant being sued on the covenant had regained the right to redeem: *Kinnard v. Trollop*, 36 Ch. D. 636; *Robbins on Mortgages*, p. 962.

*Held*, also, that the plaintiffs could only recover upon re-conveying the mortgaged property to the defendant, and accounting for the rents and profits since she purchased at the foreclosure sale, and if she failed to re-convey the land on tender of the amount ascertained to be due, judgment should be entered for the defendant with costs; and if the



defendant failed to redeem, then the plaintiffs should have judgment for the amount due upon re-conveying the land to the defendant.

*Held*, also, that the plaintiffs should, if they desired, have a strict foreclosure barring the defendant's equity of redemption, without re-conveying the land.

*Drysdale*, Q.C., and *Fulton*, for the plaintiffs.

*Harris*, Q.C., for the defendant.

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### IN CHAMBERS.

[GRAHAM, E.J., 17TH JUNE, 1899.]

#### REGINA v. CORBETT.

*Conviction—Inland Revenue Act—Warrant of commitment—Costs of conveying to gaol—Statement of amount—Necessity for.*

Application on the return of a *habeas corpus* to discharge the defendant from custody under a warrant of commitment purporting to be made pursuant to a conviction of the defendant by justices for a violation of the Inland Revenue Act. The conviction, as recited in the warrant, adjudged that the defendant should pay a fine of \$100 for the offence, and be imprisoned for one month, and pay the prosecutor \$10, and, in default of payment of these sums, that he should be imprisoned for six months, unless he sooner paid the said several sums, "including the costs of conveyance to gaol."

*Joseph A. Chisholm*, for the prisoner, contended, *inter alia*, that the amount of the costs of conveying to gaol should have been mentioned in the warrant.

*F. F. Mathers*, for the Crown.

GRAHAM, E.J.—The commitment is attacked on several grounds; but there is one which, I think, is fatal. By s. 113 of the Inland Revenue Act, R. S. C. c. 34, it is implied that the costs, including those of conveying the offender to gaol, shall be stated in the warrant of commitment. The costs and charges of conveying the defendant to gaol are imposed, but the amount is not specified in the warrant. In my opinion, the defendant should be discharged, on the terms that no action shall be brought by him in consequence of his prosecution or imprisonment.

## MANITOBA.

## In the Queen's Bench.

[FULL COURT, 18TH JUNE, 1899.]

DIXON v. MCKAY.

*Execution—Exemptions—Exemptions Act, R. S. M. c. 53, s. 43 (k)—“ Actual residence or home ”—Occupation.*

Appeal from the judgment of a County Court upon an interpleader issue.

The plaintiff recovered judgment against the defendants, and a house and outbuildings were seized under execution. The defendants claimed the house as their home, and as exempt from seizure under s. 43 of the Executions Act, R. S. M. c. 53.

The defendant Angus McKay, an Indian agent of the Dominion Government, had erected the house and outbuildings and occupied them for thirteen years. In 1897 he was dismissed, and rented his house to the Government, for his successor. The house was erected on land belonging to the Crown, but McKay intended to acquire title as soon as it should be surveyed. The sills of the buildings rested on the rocks.

When McKay left his house he went to an island about a mile and a half from the agency, and erected there a log building of a temporary character, which he occupied during the following winter and spring for the purpose of fishing to support his family; he moved there the greater part of his furniture and utensils, and his family went to live there with him; he left some of his effects in two of the outbuildings occupied by him, of which he kept the keys, and several times he slept in the office.

The trial Judge found in favour of the defendants, the claimants, and entered a verdict for them. The plaintiff, execution creditor, appealed.

*Held*, DUBUC, J., dissenting, that the appeal should be allowed with costs, and a verdict entered for the execution creditor with costs.

To constitute a place one's actual residence or home, there must be actual and permanent occupation. The occupation need not be continuous; and mere temporary absence, not intended as abandonment, will not forfeit the execution; but when, at the time of seizure, the claimant is not in actual occupation, the onus should rest with him to shew that his absence is temporary, and that he has not given up the place as his residence or home. When the buildings were first seized neither McKay nor his family were anywhere about the premises; when a second seizure was made, he or his family were living in tents pitched near the buildings.

When McKay and his family went out of occupation, he had no intention or expectation of returning to live in the buildings or to again make them his home; his abandonment of occupation was intended to be permanent.

To get the benefit of the exemption there must be occupation as a residence or home; using a building merely for storage purposes is not occupying it as a residence or home.

*Elliott*, for the plaintiff.

*Ewart*, Q.C., and *O'Reilly*, for the defendants.

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### REGINA v. HERRELL.

*Liquor License Act—R. S. M. c. 90, s. 149—Sale by druggist—Proof of registration.*

Application for a writ of *certiorari* to remove a conviction made by a police magistrate for selling liquor without the license therefor required by law.

The only substantial objection taken was that the accused was a registered druggist under the Pharmaceutical Act, who, by virtue of s. 149 of the Liquor License Act, R. S. M. c. 90, was entitled to sell intoxicating liquors under certain conditions, and that he should have been charged and convicted, if at all, only for a breach of those conditions.

The accused, giving evidence on his own behalf before the magistrate, stated that he was a "druggist duly registered." No other proof of registration was given before the magistrate. Section 38 of the Pharmaceutical Act, R. S. M. c. 116, provides a method of proving registration under the Act.

*Held*, that the objection, if otherwise valid, appeared to fail on the ground that there was no evidence under which the Court could hold the magistrate to have been bound to find that the accused was a registered druggist. It is only a registered chemist or druggist who is entitled to the exemption, and if the magistrate was not satisfied with the proof of registration, it was within his jurisdiction to find it not proved and to convict of the offence charged. Rule discharged with costs.

*Ashbaugh*, for the applicant.

*Patterson*, for the magistrate.

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### *In re* MORDEN MUNICIPAL ELECTION.

#### RUDELL v. GARRETT.

*Municipal elections—Municipal Act R. S. M. c. 100, s. 51—Qualification of mayor of village—Husband and wife.*

Appeal from a decision of a County Court Judge declaring the election of the respondent as mayor of the village of Morden void for want of qualification. There was produced at the trial a certificate of title showing some interest of the respondent's wife in a parcel of land in the village of Morden, with indorsements respecting certain mortgages by her. The property was occupied by the respondent and wife. Upon the assessment roll the wife's name appeared as owner, followed by her husband's as occupant or tenant. The valuation opposite her name was \$600; and opposite his, under the description and valuation of the property, were dots apparently indicating that these were repeated. His name did not appear elsewhere upon the roll. The mortgage given by the wife was for \$550.

By the Municipal Act, R. S. M. c. 100, s. 51, persons eligible for election as mayors of villages must be the owners at the time of election of freehold or leasehold real estate rated in their own names on the last revised assessment roll of the village to at least the amount of \$500, over and above all charges, liens, and incumbrances affecting the same. It was contended on the part of the respondent, that it was sufficient if the fee simple were rated at the requisite value, and if the mayor had any leasehold interest in it.

*Held*, that the County Court Judge was right in the view he took that the evidence showed that the respondent had not the property qualification required by the Municipal Act to make him eligible for election as mayor of the village. The natural construction of the statute is that the party's interest, whether freehold or leasehold, or partly each, is to be specifically assessed to the requisite amount over and above the amount of all charges, liens, and incumbrances affecting that interest. The respondent was not so assessed. He was entered as tenant or occupant, and it was impossible to take the entry on the assessment roll as a valuation of a leasehold interest. The husband's occupancy with his wife raised no inference of an interest in him.

Appeal dismissed with costs.

*Taylor*, for the petitioner.

*Ewart*, Q.C., for the respondent.

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#### DOUGLAS v. CROSS.

*County Court—Appeal from order dismissing application for new trial—  
Question of review of whole evidence—Powers of appellate Court.*

This action was brought in a County Court to recover commission in respect of a sale of land alleged to have been effected by the plaintiff for the defendant. Upon the trial the plaintiff recovered judgment for \$375, the full amount claimed. After the expiration of 24 days, the defendant obtained from the Judge a summons calling upon the plaintiff to show cause why the judgment should not be reversed

as being against the law, evidence, and the weight of evidence, or varied by reduction of the amount recovered, or why a new trial should not be granted because another broker had obtained judgment against the defendant for services in effecting the same sale. Upon cause shown the summons was dismissed, and the defendant appealed to the full Court. An objection was taken to the hearing of the appeal as being practically an appeal from the judgment at the trial, and not instituted until the expiration of more than the period allowed by the County Courts Acts.

The præcipe was for an appeal from the decision dismissing the summons.

The plaintiff a real estate agent, applied to the defendant for authority to procure a purchaser of the land. A price was named, and, after some negotiations by the plaintiff, the defendant agreed to accept and the purchaser to give a somewhat lower price, whereupon the plaintiff brought the parties together, and the sale was carried through. The plaintiff recovered commission at the full rate shown to be usual. The main contentions of the defence were that the plaintiff did not do all the work of procuring the purchase, as another agent had been already employed for the purpose, and had conducted some negotiations with the same purchaser which contributed materially to bring about the sale, and that the plaintiff did not procure a purchaser to buy at the rate at which he was first employed to procure one.

*Held*, that the appeal should be dismissed with costs.

The facts of the recovery by another plaintiff of commission in respect of the same sale was not in itself material.

Upon the principles laid down in *Wolf v. Tait*, 4 Man. L. R. 59, it was within the power of the trial Judge to find, as a jury, that the plaintiff was entitled to the amount allowed; there was nothing to warrant the disturbing of the judgment.

The Court is in a different position now, upon appeals from decisions of trial Judges, whether of the County Court or of this Court; there is the full right of appeal upon questions of fact as well as questions of law. The principles to

be applied in such a case are those enunciated in *The Glanibanta*, 1 P. D. 283, of which the views expressed in *Coghlan v. Cumberland* [1898] 1 Ch. 704, seem to be but an amplification.

The present appeal was not taken directly from the judgment at the trial, but from the refusal of the County Judge to reverse or vary that judgment; on such an application a County Court Judge should not be asked to review his decision as a juror, but only to correct it when it should have been set aside if rendered by a jury, or when it had been due to some oversight, error, or misconception.

It is a motion for a new trial, or to reverse or vary, which the statute authorizes, and not an appeal.

The Court should not review the evidence, and practically re-try the case, as has to be done on an appeal from the original judgment in the action: *Smith v. Smyth*, 9 Man. L. R. 569; 14 Occ. N. 63.

*Metcalf*, for the plaintiff.

*Wilson*, for the defendant.

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[RICHARDS, J., 18TH JUNE, 1899.]

### *In re* SUTHERLAND AND PORTIGAL.

*Landlord and tenant—Overholding Tenants' Act—R. S. M. c. 112—Colour of right—Demand by landlord—Sufficiency of.*

Application under the Overholding Tenants' Act.

On the 10th January, 1899, a lease was made of the property in question, which, after a notice to quit, given by the landlord's agent, was done away with by a new agreement for a new tenancy for two months from the 14th March, 1899; the tenants claimed that the tenancy was to continue after the two months until they could find another store; the landlord denied such an agreement.

When the new tenancy was entered into, the landlord's agent gave one of the tenants a receipt in writing, which, after acknowledging payment by the tenants of one month's rent in advance, continued as follows:—"This being made a new agreement that the said Portigal Brothers can remain

as tenants on the said premises for two months from the 14th day of March instant, and pay as rental \$27.50 per month, and at the end of the said period that they quietly and peaceably give up possession of the said premises."

At the end of the two months the tenants refused to go out of possession, and these proceedings were commenced.

*Held*, that the tenants held without colour of right, and a writ should issue to place the landlord in possession. The evidence, apart from the receipt in writing given to the tenants, showed not only that there was no agreement for any further time after the two months, but that it was distinctly pointed out to the tenants that, if allowed any time after the two months, it would be as a matter of grace and not of right.

The demand in writing served by the landlord requiring the tenants to go out of possession was unsigned, but was otherwise sufficient in form. When it was served its purport was verbally stated to the tenants by the person who served it, and they were told it was from the landlord's agent.

It was objected that the demand being unsigned did not comply with the 3rd section of the Act, and that, therefore, the landlord's application must be dismissed.

*Held*, a sufficient demand: *Morgan v. Leach*, 10 M. & W. 558.

*Wilson*, for the landlord.

*Bonnar*, for the tenants.

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## Supreme Court of Canada.

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[QUEBEC.]

[30TH MAY, 1899.]

### REGINA v. MONTMINY.

*Scire facias*—Title to land—Annulment of letters patent—Tender of dues paid on taking action—Sale or pledge—*Vente à réméré*—Concealment of material fact—Registration of transfers of Crown lands.

A sale of land subject to the right of redemption—*vente à réméré*—transfers the title in the lands to the purchaser in the same manner as a simple contract of sale.

*Salvas v. Vassal*, 27 S. C. R. 68, referred to.

The locatee of certain Crown lands sold his rights therein to B., reserving the right to redeem the same within nine years, and subsequently sold the same rights to M., subject to the first deed. These deeds were both registered in their proper order in the registry office for the division and in the Crown Lands Office at Quebec. M. paid the balance of Crown dues remaining unpaid upon the land and made an application for letters patent of grant thereof, in which he made no mention of any former sale of the lands having been made by the original locatee. In an action by *scire facias* for the annulment of the letters patent granted to M. upon his application:—

*Held*, TASCHEREAU, J., dissenting, that the failure to mention the *vente à réméré* in the application for the letters patent was a misrepresentation and concealment which entitled the Crown to have the grant declared void and the letters patent annulled as having been issued by mistake and in ignorance of a material fact, notwithstanding the registration of the first deed in the Crown Lands Office.

*Fonseca v. Attorney-General for Canada*, 17 S. C. R. 612, referred to.

*Held*, further, TASCHEREAU, J., dissenting, that it is not necessary that such an action should be preceded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent.

Judgment of the Court below reversed.

*Fitzpatrick*, Q.C., S.-G., and *Lane*, for the appellant.

*T. Chasse-Casgrain*, Q.C., and *L. Taschereau*, Q.C., for the respondent.

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### PRICE v. ROY.

*Negligence—Volunteer—Common fault—Division of damages.*

P. was proprietor of certain lumber mills and a bridge leading to them across the river Batiscan. The bridge being threatened with destruction by spring floods, the mill foreman called for volunteers to attempt to save it by undertaking manifestly dangerous work in loading one of the piers with stone. While the work was in progress the bridge was carried away by the force of the waters, and one of the volunteers was drowned. In an action by the widow for damages:—

*Held*, GWYNNE, J., dissenting, that the maxim “*volenti non fit injuria*” did not apply, as the case was one in which both the mill-owner and deceased were to blame, and that, being a case of common fault, the damages should be divided according to the jurisprudence of the Province of Quebec.

*Stuart*, Q.C., and *Oliver*, for the appellant.

*R. S. Cooke*, for the respondent.

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[5TH JUNE, 1899.]

### GASTONGUAY v. SAVOIE.

*Bankruptcy and insolvency—Purchase of estate by inspector—Mandate—Trusts.*

An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto, and cannot be allowed to become purchaser, on his own account, of any part of the estate of the insolvent.

*Davis v. Kerr*, 17 S. C. R. 235, followed.

Judgment of Court below reversed.

*Fitzpatrick*, Q.C., S.-G., and *Crepeau*, for the appellant.

*Geoffrion*, Q.C., *Cote*, and *Methot*, for the respondents.

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NOVA SCOTIA.]

BURRIS v. RHIND.

*Deed—Duress—Undue pressure—Provision in deed for payment of creditors  
—Right of creditors to enforce.*

The owner of land having died intestate leaving several children, one of them, W. R., received from the others a deed conveying to him the entire title in the land, in consideration of his paying all debts against the intestate estate and those of a deceased brother. Subsequently W. R. borrowed money from his sister and gave her a deed of the land, on learning which B., a creditor of W. R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a reconveyance of the land to him, and then gave a mortgage to B. The reconveyance, not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she had taken legal advice in the meantime and destroyed the deed. B. then brought an action against W. R. and his sister to have the deed to the latter set aside and his mortgage declared a lien on the land.

*Held*, affirming the judgment of the Supreme Court of Nova Scotia, 30 N. S. Reps. 405, that the sister of W. R. was entitled to a final lien on the land for the money lent to her brother; that the deed of reconveyance to W. R. had been obtained by undue influence and pressure and should be set aside, and B. should not be allowed to set it up.

B., claiming to be a creditor of the father and deceased brother of the defendants, wished to enforce the provision in the deed to W. R. by his brothers and sister for payment of the debts of the father and brother.

*Held*, that this relief could not be granted, as it was not asked in the action; but, even if it had been asked, the provision was a mere contract between the parties to the deed, of

which a third party could not call for execution, no trust having been created for the creditors of the deceased father and brother.

*Sedgewick and Congdon*, for the appellant.

*Drysdale*, Q.C., for the respondent.

## ZWICKER v. ZWICKER.

*Deed—Delivery—Retention by grantor—Presumption—Rebuttal.*

The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession, is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument.

The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that, while it professed to dispose of such property immediately, the grantor retained the possession and enjoyment of it until his death.

Judgment of Supreme Court of Nova Scotia, 31 N. S. Reps. 333, reversed.

*W. B. A. Ritchie*, Q.C., and *McLean*, for the appellant.

*Wade*, Q.C., for the respondent.

## ONTARIO.

### Supreme Court of Judicature.

### COURT OF APPEAL.

DIVISIONAL COURT.]

[29TH JUNE, 1899.]

### FRASER v. LONDON STREET R. W. CO.

*Street railways—Negligence—Damages—New trial.*

An appeal by the defendants from the judgment of a Divisional Court in the plaintiff's favour, 29 O. R. 411,

18 Occ. N. 259, and a cross-appeal by the plaintiff from that judgment, in so far as it reduced the damages awarded to him at the trial, were heard on the 11th May, 1899.

At the conclusion of the argument the appeal was dismissed with costs, and on the 29th June, 1899, the cross-appeal was dismissed without costs, the Court expressing no opinion as to the power of the Court below to make the alternative order for payment into Court of the amount of the judgment, and for a medical examination of the plaintiff at the end of a year.

*Hellmuth*, for the defendants.

*Aylesworth*, Q.C., and *A. Stuart*, for the respondent.

### CASTON v. CITY OF TORONTO.

*Assessment and taxes—Failure to distrain—Enforcing payment in a subsequent year.*

Where during all the time the roll is in the collector's hands there are goods and chattels available to answer the taxes but the collector fails to distrain, the amount due cannot be added to the taxes for a subsequent year, and then levied by distress upon the goods of the tax debtor.

The provisions of s. 135 of R. S. O. 1887 c. 193 [R. S. O. c. 224, s. 147] requiring the collector to state the reason for his failure to collect taxes and to furnish a duplicate of his account to the clerk, are imperative, and if they are not observed the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor.

Judgment of a Divisional Court, 30 O. R. 16, 18 Occ. N. 402, affirmed.

*Fullerton*, Q.C., and *W. C. Chisholm*, for the appellants.

*Clute*, Q.C., and *J. W. McCullough*, for the respondent.

### *In re* LEAK AND CITY OF TORONTO.

*Municipal corporations—Arbitration and award—Lands injuriously affected—Compensation—Damages—Interest.*

Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and

interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award.

Judgment of a Divisional Court, 29 O. R. 685, 18 Occ. N. 355, reversed.

*Fullerton*, Q.C., and *W. C. Chisholm*, for the appellants.

*DuVernet*, for the respondent.

### WILSON v. MANES.

*Municipal elections—Returning officer—Refusal to give ballot paper to voter — “Wilful act” — Absence of malice or negligence — Consolidated Municipal Act, 1892, s. 163.*

A returning officer at a municipal election refuses at his peril to give a ballot paper to a person claiming the right to vote, and if that person is in fact entitled to vote, the returning officer's refusal is a wilful act within the meaning of s. 168 of the Consolidated Municipal Act, 1892, s. 168, and renders him liable to the voter for the statutory penalty, without proof of malice or negligence.

Judgment of a Divisional Court, 28 O. R. 419, 17 Occ. N. 214, affirmed; MACLENNAN, J.A., dissenting on the ground that on the evidence there was no refusal of the ballot paper.

*W. E. Middleton*, for the appellant.

*Aylesworth*, Q.C., for the respondent.

### SMITH v. SMITH.

*Contract—Specific performance—Parent and child—Agreement to compensate —Improvement.*

An appeal by the defendant from the judgment of a Divisional Court, 29 O. R. 309, 18 Occ. N. 170, was dismissed with costs, the Court agreeing with the reasons for judgment given in the Court below.

*W. R. Riddell*, for the appellant.

*G. W. Wells*, Q.C., for the respondent.

## DALTON v. TOWNSHIP OF ASHFIELD.

*Ditches and Watercourses Act—Failure to comply with award—Action—  
Purchaser from party to award.*

No action lies to recover damages because of failure to comply with an award made under the Ditches and Watercourses Act; the remedy, if any, being under the Act itself.

The purchaser of land from an owner who was a party to proceedings under the Act is entitled to enforce the award.

Judgment of a Divisional Court reversed.

Garrow, Q.C., for the appellants.

Shepley, Q.C., for the respondent.

## SHERLOCK v. POWELL.

*Contract—Part performance—Quantum meruit.*

Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to eighty per cent. of this fixed sum as the work is done, and the balance of twenty per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a *quantum meruit*.

Judgment of a Divisional Court affirmed.

J. R. L. Starr, for the appellant.

Aylesworth, Q.C., for the respondent.

Ross, J.]

## BICKNELL v. GRAND TRUNK R. W. CO.

*Railways—Connecting lines—Negligence—Passenger—Cattle drover—Free pass.*

A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway, at a fixed rate for the whole journey. The contract provided that

the shipper, or his drover, should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only "on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants."

*Held*, that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries suffered by him in a collision caused by their servants' negligence.

*Hall v. North-Eastern R. W. Co.*, 10 Q. B. D. 437, applied. Judgment of ROSE, J., 18 Occ. N. 342, reversed.

*Osler*, Q.C., for the appellants.

*Aylesworth*, Q.C., for the respondent.

### WINN v. SNIDER.

*Sale of goods—Bills of Sale Act—Subsequent purchaser.*

A purchaser of goods who neglects to comply with the provisions of the Bills of Sale Act cannot invoke the provisions of the Act as against a subsequent purchaser in good faith, and the latter, even though he also has not complied with the provisions of the Act, obtains priority.

Judgment of ROSE, J., affirmed.

*DuVernet*, for the appellant.

*J. C. Haight*, for the respondent.

FALCONBRIDGE, J.]

### DUNN v. PRESCOTT ELEVATOR COMPANY.

*Warehouseman—Negligence—Damages—New trial.*

In an action against the owners of a grain elevator to recover damages for alleged negligence in the care of grain, one of the grounds of negligence found by the jury was that the grain had been taken into the elevator from the vessel while rain was falling, and that the vessel's hatches had not been protected:—



*Held*, that the responsibility of the defendants did not commence till the grain was delivered to them; that therefore there was no duty cast upon them to protect the grain during the process of unloading; and a general assessment of damages having been made upon this and other grounds of negligence, a new trial was ordered.

Judgment of FALCONBRIDGE, J., reversed.

*Osler*, Q.C., and *French*, Q.C., for the appellants.

*Leitch*, Q.C., and *D. W. Saunders*, for the respondent.

MACMAHON, J.]

### SMALL v. HENDERSON.

*Bankruptcy and insolvency—Assignments and preferences—Composition—  
Fraud—Bills of exchange and promissory notes—Indorsement.*

An insolvent made a compromise with his creditors, borrowing from his wife the money to pay them. She borrowed the money from one of his creditors, agreeing to pay a bonus of a large amount, and giving to the creditor for his composition payment and the bonus, her promissory notes indorsed by her husband, with a mortgage on her real estate and a chattel mortgage on his stock as collateral security. The creditor signed the composition agreement, nothing being said about the bonus to the other creditors, who knew, however, that some arrangement had been made with this creditor for the supply of the necessary funds. The insolvent, after carrying on business for some time and incurring further liabilities, made an assignment for the benefit of his creditors.

*Held*, that the transaction with the wife was valid and not a fraud on the composition, and that the creditor was entitled to rank upon the notes as far as this question was concerned.

Judgment of MACMAHON, J., affirmed; Moss and LISTER, JJ.A., dissenting.

But the notes in question having been made by the insolvent's wife, payable to the creditor's order, and having been indorsed by the insolvent before they were handed to the creditor:—

*Held*, on objection taken in this Court, that the insolvent was not liable as indorser, and that the creditor could not rank on his estate.

*G. Kappela* and *J. Bicknell*, for the appellants.

*Clute*, Q.C., and *J. G. Hay*, for the respondents.

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MACDONALD v. LAKE SIMCOE ICE AND COLD  
STORAGE CO.

*Ice—Water and watercourses—Constitutional law—Public harbour.*

The plaintiff was the owner of a lot bounded by the water's edge of Lake Simcoe, and also of the adjoining lot covered by the waters of that lake, there not being in the patent of either lot any special reservation of right of access to the shore:—

*Held*, that he was entitled to the ice which formed upon the water lot, and had the right to cut and make use of it for his profit; that no other person was entitled to cut and remove the ice except in the *bona fide* and advantageous exercise of the public easement of navigation; and that the defendants were not exercising that easement when they cut channels through the plaintiff's ice in which to float to the shore blocks of ice cut by them beyond the limits of the plaintiff's water lot.

Judgment of MACMAHON, J., 29 O. R. 247, 18 Occ. N. 178, reversed; OSLER, J.A., dissenting.

*Held*, also, OSLER, J.A., expressing no opinion, that the *locus in quo*, a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground and little shelter except from wind off the land, was not a public harbour within the meaning of the British North America Act, and that the plaintiff's grant from the Province was valid.

*William Macdonald*, for the appellant.

*R. U. Macpherson* and *G. C. Campbell*, for the respondents.

MEREDITH, J.]

# TYTLER v. CANADIAN PACIFIC R. W. CO.

*Action—Jurisdiction—Canadian Pacific Railway Company—Negligence in another Province—Service of writ.*

The personal representative appointed in this Province of a person killed in British Columbia, through the negligence there of servants of the Canadian Pacific Railway Company, may bring an action in this Province against the company to recover damages, and may serve the writ of summons on the defendants in this Province, in accordance with the provisions of Rules 159 and 160.

Judgment of MEREDITH, J., 29 O. R. 654, 18 Occ. N. 327, affirmed.

*Robinson, Q.C., Aylesworth, Q.C., and Angus MacMurchy,*  
for the appellants.

*Tytler,* for the respondent.

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## IN CHAMBERS.

[MACLENNAN, J.A., 18TH JULY, 1890.]

# WINTERMUTE v. BROTHERHOOD OF RAILWAY TRAINMEN.

*Appeal—Court of Appeal—Stay of proceedings—Removal of—Security for costs—Rules 826, 827—Costs.*

Upon an appeal to the Court of Appeal, upon security for costs being allowed, in general the proceedings ought to be stayed; but if it is made to appear in any case that the respondent may suffer injustice by his execution being stayed, then the stay may be removed, upon terms which may be just to both parties: Rules 826, 827.

The plaintiff recovered a money judgment against the defendants, a benevolent society incorporated in a foreign country, but having members in Ontario who paid dues and assessments which were transmitted abroad. The defendants launched an appeal from the judgment to the Court of Appeal, and gave security for the costs thereof. Upon an application by the plaintiff to remove the stay of proceedings

upon the judgment imposed by virtue of the security being given, the defendants' secretary-treasurer, by his affidavit, admitted that they had no assets in Ontario, but said that they were advised that they had good grounds for the appeal, but, if it should fail, that the plaintiff's claim would be paid; and this was not contradicted.

*Held*, that the dues and assessments of members in Ontario, being voluntary payments, could not be reached by a receiver or by attachment; and there was no prejudice or injustice that the plaintiff was likely to suffer by the stay, as he already had security for costs, and the delay would be compensated by interest on the judgment, if the appeal should be unsuccessful.

*Boyd v. Dominion Cold Storage Co.*, 17 P. R. 545, distinguished.

*Held*, also, that the costs of the unsuccessful motion should be paid by the applicant; there was no rule that costs of such a motion should go to the successful party upon the appeal.

*F. E. Hodgins*, for the plaintiff.

*J. H. Moss*, for the defendants.

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## HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 10TH MARCH, 1899.]

### REGINA v. REID.

*Sunday—Conviction under Lord's Day Act—Master and servant—Grand Trunk Railway Company of Canada.*

The defendant was convicted of following his ordinary calling of foreman of the Grand Trunk Railway grain elevator, in superintending the unloading of grain from a vessel into the elevator, on the Lord's Day.

*Held*, that R. S. O. c. 246 did not apply to the defendant's employer, the Grand Trunk Railway Company of

Canada, and, as it did not apply to the employer, it did not apply to the employee, the defendant; and the conviction was quashed.

*DuVernet*, for the defendant.

*A. E. O'Meara*, for the informant.

[19TH JUNE, 1899.]

### RICE v. RICE.

*Husband and wife—Wife's income handed to husband—Gift of, inferred—Fraudulent conveyance—Consideration for—Evidence.*

A wife having property settled for her separate use is entitled to deal with the money as she pleases. If she directly authorizes it to be paid to her husband, he is entitled to receive it, and she cannot recall it; and if they so live together and deal with her separate income as to show they must have agreed it should come to his hands, for their joint purposes, that it would be evidence of a direction on her part that he should receive it, and her tacit assent to his receiving it constitutes an effectual gift: *Caton v. Rideout*, 1 MacN. G. 599; *Edward v. Cheyne*, 13 App. Cas. 385.

There is a great difference between the receipt of the income of a wife's separate property by her husband and of the corpus.

In the latter case the onus of proof of a gift lies upon the husband, and must be clearly established or he will be held to be a trustee for her.

In the former the onus lies upon the wife, save, perhaps, as to the last year's income, and she must establish conclusively that he received the income, as a loan: *Alexander v. Carnhill*, 21 L. R. Ir. 511.

In an action by a judgment creditor to set aside a conveyance from a husband to a wife, in which it was set up that the annual income of the wife received from her father and his estate and handed over to the husband and used by him with his other moneys during a period of twenty-seven years of married life, was handed to him on each occasion as a loan:—

*Held*, that the evidence of both defendants without corroboration did not support the allegation of the loan, and the conveyance was set aside.

Judgment of MEREDITH, J., reversed.

*Aylesworth*, Q.C., and *H. W. Mickle*, for the plaintiff.

*E. F. B. Johnston*, Q.C., and *Heighington*, for the defendants.

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[BOYD, C., FERGUSON, J., 12TH MAY, 1899.]

*In re* MASSACHUSETTS BENEFIT LIFE ASSOCIATION.

ALLEN'S CASE.

O'DEA'S CASE.

*Life insurance—Canadian benefit association—American insurance company—Transfer of business—New contract—Validity of—Misrepresentation as to age—Effect of—Pedigree—Dominion license—Registration in Ontario—55 V. c. 39, s. 34 (O.)*

A Canadian benefit association, in which the assured held certificates of insurance, assigned all its assets and business to an American association, who issued new certificates, sealed with the association's seal, and signed in the United States by the president and treasurer, to the assured, which certificates were sent to the Canadian agent, who counter-signed and delivered them to the assured, who subsequently paid premiums.

In winding-up proceedings, where the claimants sought to prove claims on the certificates, the Master found on the evidence that misrepresentations as to age had been made in both cases by the assured, and disallowed the claims, and held that, as the contracts had been made with a benevolent association previous to the passing of 55 V. c. 39 (O.), the claimants were not entitled to the benefit of s. 34 of that Act, and the misrepresentation, being material, was fatal to the contracts.

*Cerri v. Ancient Order of Foresters*, 25 A. R. 22, followed.

On an appeal to a Divisional Court:—

*Held*, that, as the matter was one of pedigree, hearsay evidence should not have been received; that there was a novation and a new contract of insurance between the American company and the assured, which came into effect and existence after the Ontario statute of 1892, as the former were validly doing business in Canada, being licensed under s. 39 of R. S. C. c. 124.

That the completion of the contract by the signature of the agent in Canada made the contract subject to Canadian law; that the association doing business in Canada must be subject to statutory conditions imposed for the benefit of the public; and that the claimant was entitled to the benefit of ss. 33 and 34 of 55 V. c. 39 (O.)

Judgment of the Master in Ordinary reversed.

*Marsh*, Q.C., for Robert Allen.

*W. R. Smyth*, for Harriet O'Dea.

*Watson*, Q.C., for the liquidator.

[*Boyd*, C., *Ferguson*, J., *Robertson*, J., 20th JUNE, 1899.

NIAGARA FALLS PARK AND RIVER R. W. CO. v.  
TOWN OF NIAGARA FALLS.

*Assessment and taxes—Railway company—Right of way—Assessment of  
—Possession.*

A license to use is a liberty to occupy, and a precarious occupation is quite sufficient.

The plaintiffs having a license to use a right of way through the Queen Victoria Niagara Falls Park for their electric railway under an agreement confirmed by 55 V. c. 36 (O.):—

*Held*, that there was an actual, visible, continuous, and exclusive possession of the roadway for the profitable use and operation of the railway for a term, and that the company were liable to taxation for the roadbed as an occupant assessed in respect of property, but the property itself, being in the Crown or held by the public, was exempt and could not be sold to make good the tax.

Judgment of the County Court of York reversed.

*Masten*, for the defendants.

*H. S. Osler*, for the plaintiffs.

**GARLAND MANUFACTURING CO. v. NORTHUMBER-  
LAND PAPER AND ELECTRIC CO.**

*Landlord and tenant—Verbal agreement—Occupation by company—Holding over—Want of corporate seal—Contract—Executed and executory—Tenant from year to year—Lease or license—Use and occupation—Rent.*

There is a broad and well-marked distinction between contracts executed and contracts executory in the case of corporations, and where a contract is executory, a corporation cannot be held bound unless the contract is made in pursuance of its charter or is under its corporate seal.

The defendant company occupied certain premises under a verbal agreement, paid rent for a year, continued in possession afterwards for a short time, and then went out, paying rent for the time they were actually in possession.

*Held*, that, as there was no lease under seal, the company were not liable as tenants from year to year, but only for use and occupation while actually in possession.

*Finlay v. Bristol and Exeter R. W. Co.*, 7 Ex. 409, discussed and followed.

Judgment of the County Court of York reversed.

*D. E. Thomson*, Q.C., for the defendants.

*Watson*, Q.C., for the plaintiffs.

[BOYD, C., ROBERTSON, J., MEREDITH, J., 22ND JUNE, 1899.]

**REGINA v. ELLIOTT.**

*Criminal law—Evidence—Questioning prisoner—Statements while in custody.*

*Held*, that, in accordance with the great weight of authority, answers given by the prisoner under arrest on a criminal charge, in response to the officer in charge, are to be



received as evidence so long as they are not evoked or extorted by inducements or threats. They may be received if the presiding Judge is satisfied that they were not unduly or improperly obtained, which depends upon the circumstances of each case.

*T. E. Godson*, for the defendant.

*J. R. Cartwright*, Q.C., for the Crown.

[BOYD, C., ROBERTSON, J., 22ND JUNE, 1899.]

### REGINA v. GRAHAM.

*Criminal law—Evidence—Rape—Statements of prosecutrix.*

On a charge of rape it was sought to give in evidence statements made by the prosecutrix on the day following the alleged assault to a police inspector who called upon her in reference to the matter.

*Held*, that the evidence was inadmissible. The statements were not uttered as the unstudied outcome of the feelings of the woman, nor as speedily after the occasion as could reasonably be expected.

*Robinette* and *J. M. Godfrey*, for the prisoner.

*J. R. Cartwright*, Q.C., for the Crown.

[4TH JULY, 1899.]

### ROBERTS v. TAYLOR.

*Master and servant—Negligence—Infant—Factories Act.*

Appeal by the plaintiff from the judgment of MACMAHON, J., dismissing the action, which was brought to recover damages for injuries sustained by the plaintiff, a boy of twelve, who while operating a saw for making clothes pegs in the defendant's factory, had his third and fourth fingers cut off. It was contended for the plaintiff that the employment of a child under fourteen years of age, contrary to the provisions of the Factories Act, R. S. O. c. 256, was *prima facie* evidence of negligence.

*Held*, that it could not be said that the machine at which the plaintiff was put to work was dangerous or not sufficiently protected, or that with ordinary care there was any risk in doing the work assigned, nor that the plaintiff was not sufficiently informed as to the manner of doing the work. Nor could it be found upon the evidence that the injury arose from the immature age of the plaintiff rendering the work too exacting or exhausting for him. The injury appeared to be the result either of carelessness or accident, for which an adult could not sue. The situation was not differed because of his infancy or because of his being under the lawful age of employment. There was no evidence that the age was asked by or known to the defendants. No doubt the plaintiff was under 14 years of age, and should not have been employed in the defendant's factory: R. S. O. c. 256, s. 2 (5) and s. 5 (3). But, though this subjects the employer to a penalty, it does not give rise to a civil action for damages, unless there is evidence to connect this violation of the Factory Act with the accident. And again, in the absence of evidence tending to show that the infant injured was not competent to understand the situation, the work to be done, the manner of doing it, and the attending risk, and to appreciate the need for due caution, the Court may infer capacity in the case of a youth of 12 or 13 who shows intelligence in his manner and his answers.

*Race v. Harrison*, 9 Times L. R. 567, *Morris v. Boase Spinning Co.*, 22 Rettie 336, and *Lowcock v. Franklin Paper Co.*, 169 Mass. 313, referred to.

Appeal dismissed with costs.

G. Wilkie, for the plaintiff.

R. McKay, for the defendant.

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[MEREDITH, C.J., ROSE, J., 7TH JULY, 1899.]

ARNOLD v. VAN TUYL.

*Appeal—County Court—Order for security for costs—Interlocutory order—R. S. O. c. 55, s. 52 (1)—Security for costs of appeal—Stay of appeal—Rule 825.*

In an action in a County Court, after judgment therein dismissing the action with costs and notice of appeal there-

from to the High Court given by the plaintiffs, an order was made by the Judge of the County Court, upon the application of the defendants, requiring the plaintiffs within four weeks to give security for the costs of the action in addition to security already given, staying proceedings in the meantime, and directing that, in default of security being given within the time limited, the action should be dismissed with costs.

*Held*, that this order was not in its nature final, but merely interlocutory, within the meaning of s. 52 (1) of the County Courts Act, R. S. O. c. 55, and no appeal lay therefrom.

*Held*, also, that the provision of Rule 825, that no security for costs shall be required on a motion or appeal to a Divisional Court, applies to County Court appeals; and it must be assumed that the security ordered was not intended to extend to the costs of the appeal to the High Court from the judgment dismissing the action, nor the stay to the appeal itself.

*R. McKay*, for the plaintiffs.

*C. J. Holman*, for the defendants.

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### JANE BENNER v. EDMONDS.

*Settlement of action—Setting aside—Counsel—Solicitor—Costs.*

Where counsel, acting upon the instructions of the plaintiff's solicitor, effected a compromise of the action not authorized by the plaintiff, and contrary to the express instructions given by her to the solicitor, the compromise was set aside and the plaintiff allowed to proceed to trial, but, as the plaintiff and defendant were innocent parties, without costs to either against the other.

*Stokes v. Latham*, 4 Times L. R. 305, followed.

*Logie*, for the plaintiff.

*Lynch-Staunton* and *E. F. Lazier*, for the defendant.

## ANNIE BENNER v. EDMONDS.

*Libel—Privilege—Protection of interests—Excessive language—Evidence—Admissibility—Publication—Receipt of letter—Further publication—Nondirection—Damages.*

The defendant received a letter from the solicitors of the plaintiff's mother complaining of statements circulated by the defendant which had caused the mother and her family, and particularly her daughter the plaintiff, annoyance, and threatening to begin an action for slander unless a retraction were signed and costs paid. This letter was not answered by the defendant, but, the threatened action having been brought, the defendant wrote a letter, not to the solicitors, but to their client, with the avowed purpose of preventing her from proceeding with her action. In that letter he referred to the plaintiff, and said he saw her drive her father out of the house and pelt him with sticks of wood, and asked the mother if she thought it would add to her daughter's character to have this and much more published in Court and in newspapers.

*Held*, in an action for libel based upon this letter, that it did not come within the rule as to "statements necessary to protect the defendant's interests" so as to make the occasion privileged; and, even if did, the privilege was destroyed by the excess of the language.

Evidence was given by a woman who said that she saw the defendant's letter in the hands of the plaintiff's mother within twenty minutes after its receipt, and that she read it aloud in the presence of the plaintiff and her mother, and several other persons. There was also evidence to shew that the letter had been posted and given out by the postmaster to the plaintiff's mother.

*Held*, that had the evidence of the woman been offered in order to fix the defendant with liability for what was done as a further publication of the letter, it would not have been admissible, but it was admissible in order to prove publication by the defendant, which was denied, as it shewed that the letter was in the possession of the person to whom it was

addressed shortly after it was posted by the defendant, and therefore was evidence of the receipt of it by her. It may not have been necessary to give the evidence, but the plaintiff had the right to do so.

*Held*, also, that it was not a ground for interfering with the verdict of the Jury in favour of the plaintiff, that the trial Judge refused to tell the jury that the defendant was not responsible for the further publication of the letter made by the plaintiff or her mother, the jury not having been invited to increase the damages by reason of publication to others, and the damages awarded not being excessive.

*Lynch-Staunton* and *E. F. Laxier*, for the defendant.

*Logie*, for the plaintiff.

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[11TH JULY, 1899.]

### DAVIDSON v. GARRETT.

*Coroner—Direction to surgeons to hold post-mortem examination—No jury impanelled—County Crown Attorney—Consent in writing—R. S. O. c. 97, s. 12 (2)—Construction—Imperative or directory—Damages.*

The wife of the plaintiff had died suddenly, and a question arose as to whether the plaintiff could obtain a certificate of death so as to permit the interment of the body. The defendants, three practising physicians and surgeons, acting under a verbal direction from a coroner for the city where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making, and made there, a *post-mortem* examination of the dead body. The coroner had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but the warrant was afterwards withdrawn without the knowledge of the defendants.

By s. 12 (2) of the Act respecting Coroners, R. S. O. c. 97, "in no case shall any coroner direct a *post-mortem* examination to be made without the consent in writing of the County Crown Attorney, unless an inquest is actually held;" but no consent was given in this case.

The action was in trespass *quare clausum fregit*, and the cutting and mutilating of the body were alleged in aggravation of damages.

*Held*, that the coroner, having had authority to hold an inquest upon the body, and having determined that it should be held, and having begun his proceedings, had power to summon medical witnesses to attend the inquest and to direct them to hold a *post-mortem*.

*Held*, also that no rule of law exists which forbids the making of the *post-mortem* before the impanelling of the jury; that is a matter of procedure in the discretion of the coroner.

*Held*, also, that the meaning of s. 12 (2) is that the coroner should not without the required consent direct a *post-mortem* examination for the purpose of determining whether an inquest should be held, but only where the coroner has determined to hold an inquest, and gives the direction as part of the proceedings incident to it; but if the provision should be read differently, it was at all events merely directory, and did not render an act done by a surgeon in good faith, under the direction of a coroner, unlawful because the coroner had neglected to obtain the prescribed consent, where the act would be lawful if the consent had been obtained.

*Semble*, also, that if the verdict for the plaintiff had been allowed to stand, the amount of damages assessed, \$600, was excessive.

*E. F. B. Johnston*, Q.C., for the defendants.

*Robinette* and *J. M. Godfrey*, for the plaintiff.

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[BOYD, C., 6TH JULY, 1899.]

#### HIGGINS v. TRUSTS CORPORATION OF ONTARIO.

*Mortgage—Purchaser of equity of redemption—Indemnity—Death of mortgagor—Insolvent estate—Administrator—Release.*

Where the mortgagor is dead and his estate is insolvent, the mortgagee cannot compel the administrator of the estate

to seek indemnity from one who purchased the mortgaged estate from the mortgagor subject to the mortgage, nor is the administrator responsible in damages to the mortgagee for having released the purchaser from liability.

*R. U. Macpherson and G. C. Campbell*, for the plaintiff.

*J. H. Moss*, for the defendants.

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[MEREDITH, C.J., 18TH JULY, 1899.]

GUNN v. HARPER.

*Action—Jurisdiction—Redemption—Foreign lands—Constructive trustees—Limitation of actions.*

Action to have it declared that a conveyance of lands out of Ontario made in 1878 by the plaintiff to one of the defendants, though absolute in form, was in equity a mortgage, and for redemption. The grantee in 1893 made an absolute conveyance of the lands to the other defendants. All the parties resided in Ontario.

*Semble*, that had the plaintiff's grantee not conveyed to others, and the action been against him alone, it would have lain; but

*Held*, that the Court had no power to declare the other defendants constructive trustees of foreign lands; and also that their defence of the Statute of Limitations raised a question of title the determination of which involved the application of the law of the foreign country.

*G. M. Macdonnell*, Q.C., and *J. M. Farrell*, for the plaintiff.

*F. King*, for the defendant Gunn.

*Whiting*, for the other defendants.

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[ROBERTSON, J., 27TH JUNE, 1899.]

SWAIZIE v. SWAIZIE.

*Foreign judgment—Action on—Alimony—Defence—Pleading.*

Action on a foreign judgment recovered by a married woman against her husband in the State of Wisconsin for

a sum of \$800 alimony, which sum she was by the judgment declared entitled to be paid out of the real and personal estate of the husband in Ontario. In this action it was sought to have the judgment declared a lien to that amount on the lands of the defendant in this province. Both husband and wife were British subjects.

*Held*, that the Courts of this country could not aid in giving force to a foreign judgment based on the grounds on which this was based, viz., that though she had been guilty of such cruel and inhuman treatment of her husband that he was entitled to divorce under the laws of Wisconsin, which divorce was therefore declared, yet the wife was entitled to alimony out of his property. It was a good answer to this action that the plaintiff had not made out a case for alimony in this country.

*German*, for the plaintiff.

*J. C. Rykert* for the defendant.

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[MACMAHON, J., 29TH JUNE, 1899.]

POLSON IRON WORKS CO. OF TORONTO v. TOWN  
OF OWEN SOUND.

*Municipal corporations—By-laws—Exemption from taxation—Manufacturing establishment.*

*Held*, that R. S. O. c. 184, s. 366, giving municipal councils power to exempt manufacturing establishments from taxation, could not authorize such exemption when such establishments ceased under liquidation to carry on business; and a by-law authorizing exemption under the statute would therefore cease to be operative.

*J. H. Moss*, for the plaintiffs.

*W. J. Hatton*, for the defendants.



## IN CHAMBERS.

[MEREDITH, C.J., 14TH JULY, 1899.]

## HILLS v. UNION LOAN AND SAVINGS CO.

*Discovery—Inspection of buildings—Occupation of tenants—Rule 571.*

Rule 571, though not so limited in express terms, must be construed so as to be confined to cases in which that of which inspection is sought is in the possession, custody, or control of the party against whom the order is desired.

The plaintiff sued for damages for breach of the covenants to repair and to leave the premises in good repair contained in a lease from her to the defendants' assignor, for which she claimed that the defendants were answerable. The defendants were mortgagees of the lease, and had not themselves been in the actual occupation of the premises. At the time of the action the buildings and premises in question were not in the occupation of the plaintiff, but in that of her tenants.

*Held*, that an order for inspection by the defendants should not be made.

*H. D. Gamble*, for the plaintiff.

*W. E. Middleton*, for the defendants.

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## MANITOBA.

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## In the Queen's Bench.

[FULL COURT, 18TH JUNE, 1899.]

## PROCTOR v. PARKER.

*Promissory note—Fraud—Duress—Consideration—Release of prisoner.*

Appeal from a judgment of a County Court in favour of the plaintiff in an action upon a promissory note made by one Luke W. Parker, in favour of the defendant, and indorsed by the latter in blank. The dispute note denied the indorsement and presentment for payment and set up that the plaintiff was not the holder, want of consideration, and that the indorsement was obtained by fraud, duress, and undue influence. Luke W. Parker, the defendant's son, was charged, upon the information of the present plaintiff, with an offence under the Fire Prevention Act, R. S. M. c. 60, s. 4. Subsequently, after a trial before a justice of the peace, he was fined \$125, and ordered to be imprisoned in default of payment. The document alleged to be the conviction bore date the 13th July, 1895. The fine not having been paid, a warrant for the arrest of Luke W. Parker and for his imprisonment was issued, and he was arrested under it and brought to Winnipeg from his home, 20 miles distant. In order to get his release it was agreed between him and Proctor's solicitor that he should give his note for \$135 indorsed by his father, the defendant. Luke W. Parker signed the note, and a cheque was given by his solicitor for \$35, and one by the father for \$100, as security that the note would be indorsed, and he was then released.

The indorsement was subsequently made by the defendant, and the cheques given up. In making this settlement the Parkers acted under the advice and with the assistance of a solicitor. The note thus indorsed was the one sued on. It was held for a time by the Provincial Treasurer, who was entitled to half the penalty, and who gave it back to the plaintiff for suit.

*Held*, that the appeal should be dismissed with costs. The imprisonment was only for the purpose of enforcing payment of the fine. There was nothing unlawful or improper in the release in consideration of such cheques, notes, or other securities as the parties interested in the penalty were willing to accept in lieu of cash. The Provincial Treasurer was shown to have adopted the settlement to some extent. The onus of proving want of consideration was upon the defendant, and any assent of the Treasurer or authority in him to accept the note should be presumed. The release of Luke W. Parker was ample consideration for the note.

*Culver*, Q.C., and *Haney*, for the plaintiff.

*Wilson*, for the defendant.

[2<sup>RD</sup> JUNE, 1899.]

#### MUSSEN v. GREAT NORTH-WEST CENTRAL R. W. CO.

*Chose in action—Assignment of—Beneficial interest—Action by assignee.*

Appeal from decision of DUBUC, J., *ante* p. 117, dismissed with costs.

#### CREIGHTON v. PACIFIC COAST LUMBER CO.

*Sale of goods—Purchase after inspection—Non-acceptance of the goods sent—Powers of court of appeal.*

Appeal from decision of DUBUC, J., 18 Occ. N. 425.

*Held*, that the plaintiff's appeal should be allowed, the judgment for the defendants set aside, and judgment entered for the plaintiff for the full amount paid by him with costs of the action and the appeal.

The Queen's Bench Act, 1895, s. 48, and Rules 638-641 constitute the Court *in banc* a court of appeal from a single Judge upon questions of fact as well as questions of law. Upon such appeals the remarks of Baggallay, J., in *The Glannibanta*. 1 P. D. 287, are directly applicable. This was a case in which the Court was in a position to draw its own

inferences and form its own conclusions from the circumstances and the documentary evidence; the conclusion was that the goods supplied were such as the plaintiff was not bound to accept.

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### REGINA v. HAMILTON.

*Criminal law—Failure of prisoner to appear for sentence—Conviction quashed—New trial—Estreat of recognizance.*

Application to set aside a roll of estreated recognizances and a writ of *fi. fa.* issued thereon.

One Hamilton was convicted of a criminal offence at a sitting of the Court for the trial of criminal matters for the Western Judicial District, but, a case being reserved upon a point of law arising at the trial, he was released on bail. The condition of the recognizance was that Hamilton would appear at the next sitting of the Court for the trial of criminal matters for that district to receive sentence. After the hearing of the reserved case the full Court quashed the conviction and ordered a new trial. At the next following sitting for the trial of criminal matters for the Western Judicial District, Hamilton was called but failed to appear, and the clerk of the Court entered his recognizance upon a roll as forfeited, and proceedings were taken which resulted in the issue of a writ of *fi. fa.* against the cognizors. The main question was whether, the purpose of Hamilton's attendance having failed, his bail were bound for his appearance.

An order of the Court quashing the conviction and directing a new trial was taken out, but apparently no certificate of the order or direction was given by the Chief Justice or Senior Judge pursuant to s. 746, s.-s. 3, of the Criminal Code. Whether the order itself was before the Court when Hamilton failed to appear was not shown.

*Held*, that the application should be allowed, and the rule made absolute to set aside the proceedings. To say that Hamilton was bound to appear at all events, or for any other purpose than to receive sentence, would be to change the condition of the recognizance and to hold the sureties to an

undertaking substantially different from the one they entered into: *Reg. v. Wheeler*, 1 C. L. J. N. S. 272; *Reg. v. Ritchie*, *ib.* The accused and his sureties were entitled to presume that all proper steps would be taken, and that the accused would not be called for sentence.

*Perdue*, for the Crown.

*Howell*, Q.C., for the bail.

[30TH JUNE, 1899.

# CITY OF WINNIPEG v. CANADIAN PACIFIC R. W. Co.

*Assessment and taxes—By-law to exempt from municipal taxes—Liability for school taxes.*

Appeal from decision of BAIN, J. 18 Occ. N. 370, dismissed with costs.

Per DUBUC, J., dissenting—The appeal should be allowed with costs. The by-law in question should be held to be in the nature of a contract by which the plaintiffs are bound; it was duly and wholly legalized by the legislature; it exempted the property of the defendants from all assessments and taxation by the city of Winnipeg; that school rates and levies were not excluded from such exemption; that the setting out of the by-law in the plaintiffs' replications was no answer to the pleas to which they were replications; and that the demurrer to the replications should be allowed.

[KILLAM, C.J., 23RD JUNE, 1899.

# MOIR v. PALMATIER.

*Lease—Forfeiture by non-payment of rent—Agreement for sale by landlord to tenant—Power to landlord to re-sell on default—Exercise of option—Specific performance.*

By the original statement of claim plaintiff sought to recover possession of a parcel of land, and damages for a breach of a covenant for quiet possession in the case under which the plaintiff claimed.

The land was demised to the plaintiff by S. J. Cotter for seven years from the 27th March, 1895, at an annual rent payable on the 15th August, with a proviso for re-entry for non-payment of rent. Simultaneously with the making of the lease the plaintiff and Cotter entered into an agreement for the plaintiff to purchase the land, the rents to be applied on the purchase money and interest, the balance of the purchase money to be paid in 8 years. The plaintiff took possession and paid the first year's rent. In February, 1896, Cotter conveyed the land to Palmatier, subject to the lease and agreement. The rent for 1896 not having been paid, Palmatier, who resided in Ontario, came to Manitoba in the summer of 1897; he realized the rent for 1896, and returned home before the 15th October, leaving a distress warrant for the 1897 rent in the hands of an agent; he also entered into negotiations with the defendant Mills, and in October Palmatier sent Mills an instrument by which he purported to demise the land to Mills and his wife for five years from the 15th October, 1897, with a right of purchase within or at the end of the first year of the term. The lease was executed by the Millses when they took possession and made improvements.

The action was commenced on the 29th April, 1898. The statement of claim set out the lease to the plaintiff and the agreement of sale to her; that the lease to Mills was in breach of and contrary to the provisions of the plaintiff's lease and agreement; that the Millses had actual notice of the plaintiff's lease and agreement before the execution of their lease; and that Mills had refused possession to the plaintiff.

Palmatier set up the non-payment of the rent and re-entry under the lease to the plaintiff. The Millses set up their lease and a subsequent conveyance to them from Palmatier and registration of their conveyance.

At the trial the plaintiff applied for and obtained leave to amend by alleging the purchase by the Millses and asking for specific performance of the contract of sale to the plaintiff; the plaintiff also asked for leave to amend by adding a prayer for relief from forfeiture of the leasehold interest, in the event of the Court holding that there had been a forfeiture.

*Held*, that the amendment seeking relief from the forfeiture should not be allowed. It would be wholly inconsistent with the allegations of payment of the rent and performance of the covenants. The agreement between the plaintiff and Cotter contained a provision that time was to be considered the essence of the agreement, and that unless the payments were punctually made Cotter should at his option declare the agreement null and void and he should be at liberty to re-sell.

*Held*, that while that clause apparently gave a mere option to declare the contract of sale null and void, not making it void *ipso facto* for default, the lease to Mills and their taking possession, and the other circumstances following the default and make known to the plaintiff were sufficient to constitute an exercise of the option. It would not seem that such a declaration must be made in any formal manner. There seemed to have been a sufficient communication to plaintiff of the intention of both Palmatier and the Millses to consider the agreement off, and the plaintiff evidently so understood them.

Action dismissed with costs.

*Culver* Q.C., and *Pitblado*, for the plaintiff.

*Ewart*, Q.C., and *Hough*, Q.C., for Palmatier.

*Huggard*, for Mills.

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[DUBUC, J., 5TH JULY, 1899.]

### DOIDGE v. MIMMS.

*Prohibition—County Court—Judgment not delivered within time prescribed by statute—Delay in applying for prohibition—Discretion of Court to grant.*

Application for a writ of prohibition. The defendant resided in Ontario, and was sued as administrator of the estate of R. Kingdon, late of Selkirk, Manitoba, where the plaintiff also resided. The action was brought in the County Court of Selkirk, and tried on the 27th August, 1898; judgment was reserved and rendered on the 11th January, 1899. The defendant had no property in Manitoba, and nothing was done to enforce the judgment there.

On the 25th April an action was brought against the defendant in Ontario, and judgment rendered in favour of the plaintiff on the 17th May.

Notice of application for the writ of prohibition was given to the plaintiff on the 20th May. The point raised in support of the application was that by s. 130 of the County Courts Act, R. S. M. c. 33, as amended by 56 V. c. 6, s. 1, the County Court Judge has to announce his decision in a case within 60 days from the hearing, and that in this case judgment was rendered long after that period had elapsed.

*Held*, that the application should be dismissed with costs. The defendant had not in any way been prejudiced by the non-compliance with the provision requiring the Judge to announce his decision within the 60 days prescribed; such provision is a mere matter of procedure; and the delivery of judgment after the prescribed time is an irregularity only; the proper remedy against such irregularity would be to appeal against the judgment. The plaintiff, through her solicitor, was made aware of the judgment as soon as it was delivered; she might have appealed against it, but did not, and delayed for more than four months after judgment was rendered before making the application for prohibition.

This was not a case in which the discretion of the Court should be exercised in favour of prohibition.

*Heap*, for the plaintiff.

*Hull*, for the defendant.

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*In re H., A SOLICITOR.*

*Solicitor and client—Taxation—Solicitors' Act, 6 & 7 V. c. 73 (Imp.)—Review of taxing Master's report—Discretion of Master—Payment to solicitor out of jurisdiction as agent of client.*

H. had been employed for a number of years as solicitor, by a loan company, whose head office was in Toronto, in connection with certain transactions in Manitoba, out of which litigation had arisen, and he rendered them a bill of costs. Pursuant to an order, the bill was taxed as between solicitor and client. Both parties applied for a review of the taxation.



The company objected to certain items — aggregating \$82.46—which had been allowed to the solicitor. The ground of the objection was that these costs were incurred through the negligence and a mistake of law of the solicitor in consenting, against instructions, to a certain clause in a decree made in a suit in which the company were concerned. Some garnishee proceedings were taken against the shareholders of the company which were unwarranted and had to be set aside. The solicitor made an application and succeeded in having them set aside. It was contended on behalf of the solicitor that the mistake, if mistake there was, was caused through want of proper instructions by the clients, or on account of delays by the company in furnishing the information and materials asked for. The taxing Master allowed the items.

*Held*, that the finding of the taxing Master should not be interfered with.

As a rule, the discretion exercised by the taxing Master should not be interfered with, except when it is clearly shown that he has erred in well-established points of law, or has been mistaken as to some material facts upon which he has based his finding.

As to the application of the solicitor, one of his objections was that the taxing Master should not have allowed to the company the general costs of the reference. He rendered his bill to the company for \$769.59, of which there was \$414.25 charged as fees, and \$355.34 as disbursements. H. had been employed by the company through the company's Toronto solicitors. As to the Toronto solicitors, he seemed to have understood that he was acting on agency terms, and that he was to remit them one-half of his fees. Pursuant to that understanding, on rendering his bill of costs he sent to the Toronto solicitors \$207.15, half of \$414.25, charged as fees, leaving a balance of \$562.44, which he claimed from the company, with however, an intimation to the solicitors that, as between the company and himself the bill was rendered for \$769.59, though he only claimed from the company \$562.44.

The bill was taken before the taxing Master, as a whole, for \$769.59; he taxed off \$221.40, leaving a balance of

\$548.19. On the ground that more than one-sixth of the whole bill was taxed off, the Master allowed the costs of the reference to the company and taxed the costs to the company against the solicitor.

The solicitor objected: (1) that there was not one-sixth of the bill taxed off; (2) that if there were, the rule which obtained in England, under the Solicitors' Act, 6 & 7 V. c. 73, s. 37, was not in force in this Province. It was contended that the English rule had been repealed by Rules 926 and 958 of the Queen's Bench Act, 1895.

*Held*, that the Solicitors' Act, 6 & 7 V. c. 73, was in force in Manitoba.

H. was the solicitor in Manitoba of the company, and not the agent or servant of the Toronto solicitors; the latter had no standing in the Manitoba Courts, and were not entitled to the moneys they received and retained as their share of the fees on agency terms, they must be considered only as the agents of the company; the moneys remitted to them should be considered as remitted the company, and H. was entitled to be credited with the amount.

The report of the Master stating that the balance of \$221.40 must be paid by H. to the company should be amended and varied so as to deduct from the amount to be paid to the company the sum of \$207.15 already remitted by H.

Both appeals dismissed without costs.

*Mulock*, Q.C., for the company.

*Metcalf*, for the solicitor.

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## Supreme Court of Canada.

ONTARIO.]

[5TH JUNE, 1899.]

## GREEN v. WARD.

*Construction of deed—Partition—Charge upon land.*

A deed for the partition of land held in common contained a conveyance of a portion thereof to M. W., for certain considerations therein recited, of which one was the condition that she should procure from her minor children, upon their coming of age, the necessary quit claim deeds for the release of their interests in another portion of the land in question apportioned and conveyed to her coparceners; and the amount of certain payments of money then made for the purpose of effectuating the partition was by the deed of partition declared to remain a lien upon the portion of the land thereby conveyed to M. W. until such quit claims should have been obtained and delivered to her said coparceners.

*Held*, that the recital was sufficient to charge that portion of the land so conveyed to M. W. with the amount of the payments of money as security for the due execution and delivery of the quit claims in conformity with the condition stipulated in the deed of partition.

Judgment of the Court of Appeal affirmed.

*Gundy*, for the appellants.

*John A. Robinson*, for the respondent.

## SPARKS v. WOLFE.

*Will—Change in law—"Heirs"—Primogeniture—14 & 15 V. c. 6.*

The Act 14 & 15 V. c. 6, abolishing heirship by primogeniture, placed no legislative interpretation upon the word

“heirs.” Therefore, where a will, made after it was in force, devised property on certain contingencies to “the heirs” of a person named, such heirs were all the brothers and sisters of said person, and not his eldest brother only.

Judgment of the Court of Appeal, 25 A. R. 326, 18 Occ. N. 286, affirmed.

*O’Gara*, Q.C., and *Wyld*, for the appellant.

*A. E. Fripp*, for the respondent.

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GREAT NORTHERN TRANSIT CO. v. ALLIANCE  
INSURANCE CO.

*Marine insurance—Construction of policy—Condition.*

A policy issued in 1895 insured against fire the hull of the S.S. Baltic, including engines, etc., “whilst running on the inland lakes, rivers, and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building.” The Baltic was laid up in 1893, and was never afterwards sent to sea. In 1896 she was destroyed by fire.

*Held*, reversing the judgment of the Court of Appeal, 25 A. R. 393, 18 Occ. N. 393, that the policy never attached; that the steamship was only insured while employed on inland waters during the navigation season or laid up in safety during the winter months.

*Held*, also, that the above stipulation was not a condition but rather a description of the subject-matter of the insurance, and did not come within s. 115 of the Ontario Insurance Act relating to variations from statutory conditions.

*W. Nesbitt* and *R. McKay*, for the appellants.

*Osler*, Q.C., and *W. M. Douglas*, for the respondents.

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*In re LAZIER.*

*Appeal—Habeas corpus—Extradition—Motion to quash—Necessity for motion.*

L., having been ordered to be extradited to the United States on charges of forgery and other offences, obtained a

writ of *habeas corpus*, and applied to MEREDITH, C.J., for his discharge, which was refused: 30 O. R. 419, *ante* 72. The Court of Appeal having affirmed the order of MEREDITH, C.J.: *ante* 206: the prisoner sought to appeal to the Supreme Court of Canada, and on the 7th June, 1899, the May session of the Court being about to come to an end, application was made to have the 10th June, or some later day, named for hearing a motion to quash such appeal, notice of motion having been given for the last-named day.

*Held*, refusing the application, that there was no necessity for a motion to quash, as the matter was *coram non judice*, s. 31 of the Supreme and Exchequer Courts Act having expressly taken away the jurisdiction of the Court to hear such appeals.

A. F. May, for the application.

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## CARROLL v. PROVINCIAL NATURAL GAS CO.

*Res judicata—Deed—Reservation—Construction—Reformation.*

In an action relating to the construction of a deed, the plaintiff claimed the benefit of a reservation contained in a prior agreement, but judgment was given against him on the ground that the agreement was superseded by the deed. He then brought an action to reform the deed by inserting the reservation therein.

*Held*, that the subject-matter of the second action was not *res judicata* by the previous judgment.

Judgment of the Court of Appeal reversed.

Aylesworth, Q.C., for the appellants.

T. D. Cowper and W. M. Douglas, for the respondents.

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## HYDE v. LINDSAY.

*Bankruptcy and insolvency—Purchase of insolvent estate—Refusal to complete—Action by curator—Completion after judgment in—Subsequent action for special damages—Res judicata—Foreign law.*

A merchant in Ottawa, Ontario, purchased the assets of an insolvent trader in Hull, Quebec, but refused to accept

delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel the purchaser to accept, and obtained judgment, whereupon the purchaser accepted delivery and paid the purchase money. The curator subsequently brought another action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery.

*Held*, reversing the judgment of the Court of Appeal, that, under the law of Quebec, by which the case was governed, the curator was entitled to recover the expenses and disbursements which, as a prudent administrator, he was obliged to make for the safe-keeping of the property.

*Held*, also, that these special damages, most of which could not be ascertained until the purchase was completed, could not have been included in the action brought in the Quebec Courts, and the right to recover them was not *res judicata* by the judgment in that action.

*Belcourt*, for the appellant.

*Aylesworth*, Q.C., and *Pratt*, for the respondent.

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### CASTON v. CONSOLIDATED PLATE GLASS CO.

*Master and servant—Hiring of servant by third person—Control over service—Negligence.*

A plate glass company hired by the day the general servant and horse and waggon of another company for use in its business, and, while so hired, the servant, in carrying a load of glass, knocked a man down and seriously injured him.

*Held*, reversing the judgment of the Court of Appeal, 26 A. R. 63, *ante* 58, that the plate glass company was not liable in damages for the injury; that the driver remained the general servant of the company from which he was hired, and not that of the plate glass company.

*C. H. Ritchie*, Q.C., for the appellants.

*J. W. McCullough* and *Roche*, for the respondent.

[7TH JUNE, 1899.]

**HENDERSON v. CANADA ATLANTIC R. W. CO.***Railway—Highway crossing—Warning by ringing bell or whistling—Shunting—Negligence—Proximate cause.*

H., while driving along a street in Ottawa, came to a railway crossing and had reached the outer rail when an engine and cars engaged in shunting came along on another track nearer the opposite side. H. tried to turn his horses, which became frightened and threw him out, causing injuries, for which he brought an action against the railway company.

*Held*, affirming the judgment of the Court of Appeal, 25 A. R. 437, 18 Occ. N. 397, that the evidence showed that no bell was rung or whistle blown or other warning given as the engine approached the crossing, and the want of such warning was the proximate cause of the injury to H.

*Held*, further, that s. 256 of the Railway Act, requiring warning to be given at least 80 rods from a crossing, applies in case of shunting or other temporary movements as well as in the general traffic.

*Chrysler*, Q.C., and *C. J. R. Bethune*, for the appellants.

*Wallace Nesbitt* and *Macfarlane*, for the respondent.

QUEBEC.]

[5TH JUNE, 1899.]

**CITY OF MONTREAL v. CADIEUX.***Appeal—Evidence—Concurrent findings on questions of fact—Reversal on appeal.*

Although there may be no concurrent findings on questions of fact in both Courts below, the Supreme Court of Canada will interfere upon appeal where it clearly appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary.

*TASCHEREAU*, J., dissented, holding that as there had been concurrent findings in both Courts below, supported by the evidence, an appellate Court ought not to interfere.

*Alwater*, Q.C., and *Ethier*, Q.C., for the appellants.

*Beaudin*, Q.C., for the respondent.

NOVA SCOTIA.]

## WILLIAMS v. BARTLING.

*Negligence—Questions of fact—Findings of jury.*

While W. was working on a vessel in port, a boom had to be taken out of the crutch in which it rested, and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced, which the master undertook to do. When the boom was taken out, it fell to the deck and W. was injured.

In an action against the owners for damages, the jury found that the fall of the boom was owing to the rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants.

*Held*, affirming the judgment of the Supreme Court of Nova Scotia, 30 N. S. Reps. 548, GWYNNE, J., dissenting, that the first part of the finding did not necessarily mean that the rigging had never been secured, or that if secured originally it had become insecure by negligence of the defendants, and the jury having negatived negligence, their finding should not be ignored.

W. B. A. Ritchie, Q.C., and E. D. King, Q.C., for the appellants.

Drysdale, Q.C., for the respondents.

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BROWNELL v. ATLAS ASSURANCE CO.

*Fire insurance—Condition in policy—Time limit for submitting particulars of loss—Condition precedent—Waiver—Authority of agent.*

A condition in a policy of insurance against fire provided that the assured "is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits."

*Held*, following *Employers' Liability Assurance Corporation v. Taylor*, 29 S. C. R. 104, ante 56, that compliance with this condition was a condition precedent to an action on the policy.



*Held*, also, that a person not an officer of the insurance company, appointed to investigate the loss and report thereon to the company, was not an agent of the latter having authority to waive compliance with such condition, and if he had such authority, he could not, after the fifteen days had expired, extend the time without express authority from his principal.

*Held*, further, that compliance with the condition could not in any case be waived unless such waiver was clearly expressed in writing signed by the company's manager in Montreal, as required by another condition in the policy.

Judgment of the Court below, 31 N. S. Reps. 348, reversed.

*Drysdale*, Q.C., and *Currie*, Q.C., for the appellants.

*Dickie*, Q.C., and *Congdon*, for the respondent.

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#### MARGESON v. COMMERCIAL UNION ASSURANCE CO.

*Fire insurance—Construction of contract—"Until"—Condition precedent—Forfeiture—Waiver—Estoppel—Authority of agent or adjuster.*

Certain conditions of a policy of fire insurance required proofs, etc., within fourteen days after the loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that until such proofs were produced, no money should be payable by the insurer and for forfeiture of all rights of the insured if the claim should not, for the space of three months after the occurrence of the fire, be in all respects verified in the manner aforesaid.

*Held*, that the condition as to the production of proofs within fourteen days was not a condition precedent to the liability of the insurer; that the force of the word "until" in the subsequent clause could not give to the omission of such proofs, within the time specified, the effect of postponing recovery merely until after their production; and that the clause as to forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period.

Neither the local agent for soliciting risks, nor an adjuster sent for the purpose of investigating a loss under a policy of fire insurance, can be considered as persons having authority from an insurer, either by their acts or words, to waive compliance with conditions precedent to the insurer's liability, or to extend the prescribed time thereby limited for the fulfilment of their requirements; and, as the policy in question specially required it, there could be no waiver except by indorsement in writing upon the policy signed by an officer of the company having authority for that purpose.

Judgment of the Court below, 31 N. S. Reps. 337, reversed.

*Brownell v. Atlas Assurance Co.*, ante, 298, followed.

*Drysdale*, Q.C., for the appellants.

*Borden*, Q.C., for the respondent.

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### ZWICKER v. FEINDEL.

*Sale of land—Misrepresentation of vendor—Estoppel—Counterclaim—  
Reformation of deed—Amendment of pleadings.*

In an action of trespass to land the defendants, by counterclaim, alleged that the locus was intended to be included in a purchase by them from the plaintiff, but that, owing to the plaintiff having stated that the boundary of the lot to be purchased was a certain pine tree, which was not the boundary, the defendants were misled; and they asked that the deed be reformed so as to contain the piece on which the alleged trespass occurred. The Supreme Court of Nova Scotia held that the plaintiff had wilfully deceived the defendants as to the boundary, but, as the counterclaim did not allege fraud, the deed could not be reformed, and the defendants should be left to their remedy by action.

*Held*, reversing such judgment, 31 N. S. Reps. 232, that, under R. S. N. S., 5th ser., c. 104, the Court below could have amended the counterclaim by inserting the necessary allegation, and the Supreme Court of Canada could likewise amend it under 43 V. c. 34, or R. S. C. c. 135, ss. 63-65.

*Held*, also, that the plaintiff was estopped from claiming the locus as his property.

*W. B. A. Ritchie*, Q.C., and *McLean*, for the appellants.

*Newcombe*, Q.C., and *Wade*, Q.C., for the respondent.

NEW BRUNSWICK.]

### MOORE v. WOODSTOCK WOOLLEN MILLS CO.

*Highway—Dedication—User—Evidence.*

In order to establish the existence of a public highway by dedication, it must appear that there was not only an intention on the part of the owner to dedicate the land for the purposes of a highway, but also that the public accepted such dedication by user thereof as a public highway.

In a case where the evidence as to the user was conflicting, and the jury found that there had been no public user of the way in question, the trial Judge disregarded this finding, and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full Court.

*Held*, that, as such decision did not take into account the necessity of establishing public user of the locus, it could not stand.

Judgment of the Supreme Court of New Brunswick reversed.

*Gregory*, Q.C., for the appellants.

*Stockton*, Q.C., and *Connell*, Q.C., for the respondents.

BRITISH COLUMBIA.]

### McNERHANIE v. ARCHIBALD.

*Mines and minerals—Partnership in claim—Sale of claim—Rights of partner whose mining license has expired—Statute of Frauds—British Columbia Mineral Act.*

Sections 50 and 51 of the Mineral Act of 1896, B. C., which prohibits any person dealing in a mineral claim who does not hold a free miner's certificate, does not prevent a

partner in a claim not holding a certificate from recovering his share of the proceeds of a sale thereof by his co-partner.

A partnership may be formed by a parol agreement, notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case.

Judgment of the Supreme Court of British Columbia, 6 Brit. Col. L. R. 260, affirmed; GWYNNE and SEDGEWICK, JJ., dissenting.

*Robinson*, Q.C., for the appellant.

*S. H. Blake*, Q.C., and *Latchford*, for the respondent.

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## ONTARIO.

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### Supreme Court of Judicature.

### COURT OF APPEAL.

### IN CHAMBERS.

[Moss, J.A., 26TH JULY, 1899.]

### RICE v. RICE.

*Appeal—Court of Appeal—Stay of proceedings—Removal of—Security for  
—Money directed to be paid into Court—Special circumstances.*

Motion by the plaintiff for an order that execution be not stayed unless and until the defendants should have given security for \$1,700 directed by the judgment of a Divisional Court, now in appeal to this Court, to be paid into Court to the credit of this action. The action was brought to recover the amount of a promissory note made by the defendant T. G. Rice in favour of the plaintiff, and to set aside a transfer of a farm by that defendant to the other defendant, his wife, and a transfer of the sum of \$1,700 by him to her. The action was dismissed at the trial, but the plaintiff succeeded on appeal to a Divisional Court, and a decree was made declaring the conveyance of the farm void against

creditors, and directing payment of \$1,700 into Court: *ante* 271. The defendants launched an appeal to the Court of Appeal and gave security for the costs of such appeal, whereupon there was a stay, which the plaintiff now sought to have removed.

*Held*, that there were not in this case any special circumstances distinguishing it from the case of *Wintermute v. Brotherhood of Railway Trainmen*, *ante* 269, or taking it out of the general rule followed in that and other cases. No such case of pressing necessity for removing the stay of execution pending the appeal as is called for in order to overcome the governing principle had been made out.

Motion refused with costs to the defendants in any event of the appeal.

*H. W. Mickle*, for the plaintiff.

*Heighington*, for the defendants.

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## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 21st JUNE, 1899.]

### TORONTO AUER LIGHT CO. v. COLLING.

*Patent for invention—Process and product—Purchaser of articles infringing—Profits and damages—Keeping accounts—No justification of sale of infringing articles—High Court—Final court of appeal—Deference to other Courts—Onus of proof.*

A patent granting the exclusive right of making, constructing, using, and selling to others to be used, an invention described in the specifications, setting forth and claiming the method of manufacture, protects not only the process but the thing produced by that process; and an action will lie against any person purchasing and using articles made in derogation of the patent, no matter where they come from; and, although the plaintiff cannot have both an account of profits and also damages against the same defendant, he may have both remedies as against different persons, *e.g.*, maker and purchaser, in respect of the same article.

A keeping of the accounts pending the action against the importers does not operate as a license to justify the sale of the articles; it is only an expedient to preserve the rights of all parties to the close of the litigation.

As the infringing articles were manufactured in the United States of America and brought into Canada for sale, there was sufficient evidence given that they were made according to the plaintiffs' process to throw the onus on the defendants of showing the contrary.

Although the High Court is in County Court cases a final court of appeal, it is its duty to defer to previous cases affirming the validity of a patent, and to follow the example of the Court of Appeal in refusing to disturb a decision of the Exchequer Court of Canada.

Earlier and later American cases commented on and contrasted,

Judgment of the County Court of York varied.

*W. Cassels*, Q.C., and *DuVernet*, for the defendant.

*Aylesworth*, Q.C., and *F. A. Hilton*, for the plaintiffs.

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### IN CHAMBERS.

[MEREDITH, C.J., 14TH JULY, 1899.]

### *In re* CONFEDERATION LIFE ASSOCIATION AND CORDINGLY.

*Interpleader — Summary application — Rule 1103(a) — Insurance moneys — Adverse claims — Foreign claimants — Notice of motion — Service out of jurisdiction — Rule 162 (3).*

Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order.

*Held*, that they were entitled to avail themselves of the provisions of Rule 1103 (a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons.

*Held*, also, that, under the wide provisions of Rule 162 (3), there was jurisdiction to allow service out of Ontario of the company's notice of motion for the interpleader order.

But, *semble*, that such notice was intended to be the foundation of proceedings substituted for an action, and by which the Court's jurisdiction over the persons served was asserted; and *quere* as to what might happen on the return of the motion if the claimants did not appear and submit to the jurisdiction.

*J. J. Maclaren*, Q.C., for Sarah E. Langridge.

*Snow*, for the association.

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## NOVA SCOTIA.

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In the Supreme Court.

IN CHAMBERS.

[RITCHIE, J., 2ND AUGUST, 1899.]

*In re* GRANT.

*Arrest—Judgment debtor—Habeas corpus—Motion for discharge—Regularity of execution—Validity of previous orders.*

On the return of a *habeas corpus*, W. R. Grant applied under R. S. N. S. c. 117 for his discharge from custody in the county gaol at Amherst.

The return shewed that he was detained by virtue of an execution which was perfectly good on its face, in accordance with the provisions of the Collection Act, 1894.

*F. F. Mathers*, for the applicant, contended that the order under which the execution issued should not have been made,

because a previous order for the payment of the judgment by instalments was irregular and bad, inasmuch as it did not shew the jurisdiction of the stipendiary magistrate who made it.

*J. A. Chisholm, contra.*

RITCHIE, J.—Both these orders were subject to appeal under the provisions of the Collection Act, and no appeal having been asserted, I am of opinion that I cannot try their validity now in these proceedings. The truth of the return is not denied, and the execution under which Mr. Grant is held is a complete justification for his detention. The motion must be refused.

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## MANITOBA.

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### In the Queen's Bench.

[KILLAM, C.J., 29TH JULY, 1899.]

*In re* BUCHANAN.

*Real Property Act — Cancellation of certificate of title — Application by district registrar.*

Application for cancellation of a certificate of title under the Real Property Act.

The land was granted to Joseph Buchanan by letters patent on the 6th March, 1883; he died in 1893, having devised his real and personal estate to his wife Jane Buchanan, by a will in which he appointed her and James McKerchar executor and executrix, to whom probate was granted. By deed dated the 21st March, 1894, the executor and executrix conveyed the land to James Buchanan, but the probate and conveyance were never registered.

In October, 1897, Jane Buchanan died intestate, leaving several children, and administration of her estate was granted to the official administrator for the central Judicial District.



On the 18th December, 1896, the land was sold for taxes, and the purchaser obtained a tax sale certificate, which he subsequently assigned to James Buchanan, one of the children of Jane Buchanan. The lands not having been redeemed, James Buchanan applied, on the 13th February, 1899, to the district registrar for a certificate of title to the land pursuant to the tax sale.

The district registrar, finding no instruments affecting the land registered, and learning of the grant to Joseph Buchanan, directed that notice of the application should be served upon the patentee. He was then informed that Joseph Buchanan had died, and that McKerchar was the sole surviving executor, whereupon the district registrar directed that the notice should be served upon McKerchar. Subsequently proof of service of the notice was given, and a memorandum signed by McKerchar was proved, in which he stated that he did not intend to redeem the land, and had no objection to the immediate issue of a certificate of title to James Buchanan. On the 10th May, 1899, the district registrar issued a certificate of title to James Buchanan; but, being subsequently informed of the conveyance to Jane Buchanan and of her death, and the grant of administration of her estate, he issued a summons to James Buchanan to deliver up the certificate of title that it might be cancelled as having been fraudulently or wrongfully obtained. On the 3rd June, 1899, James Buchanan's solicitor sent the certificate to the district registrar, with a letter contending that the officer had no power to cancel a certificate. The district registrar then applied in Chambers, upon notice, to have the certificate of title delivered up to be cancelled, and James Buchanan appeared by counsel and objected to the jurisdiction of the district registrar or of a Judge to cancel the certificate.

*Held*, that the district registrar should be directed to cancel the certificate of title; the costs of the application to be paid by James Buchanan.

If a person summoned by a district registrar delivers up his certificate of title for the purpose of its being cancelled, the district registrar acquires, with the consent of such person, the power to cancel it; but where it is not delivered up

at all, or not for that purpose, then the district registrar cannot cancel it until so empowered by order of a Judge.

Here the holder of the certificate did deliver it to the district registrar, but only in a qualified manner. He did not assent to its being cancelled. Any objection to the cancellation must be decided upon by a Judge.

Under the Assessment Acts of 1897 and 1898 the certificate of title should not have been issued until the expiration of six months from the making of the application therefor, a period which had not yet expired. It was issued upon a consent, but such issue in advance of the statutory period seemed to constitute an error in point of law. Its issue upon consent of the surviving executor of Joseph Buchanan could only be ascribed to the district registrar's ignorance of the devise and of the conveyance to the devisee, which constituted error in point of fact.

*Metcalf*, for the district registrar.

*Howell*, Q.C., for James Buchanan.

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## ONTARIO.

## Supreme Court of Judicature.

## HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., 14TH JULY, 1899.]

WATSON v. HARRIS.

*Patent of invention — Subsequent patent — Improvement on first patent —  
Assignee of first patent — Rights of.*

The defendant and another, who had acquired an half interest in a patent for making fuel from garbage, etc., assigned to the plaintiff one-third interest therein and all improvements and amendments thereto, it being also contemplated that the invention could and would be utilized for making gas. The defendant subsequently procured a patent for making gas from such garbage, etc., the ingredients used in the production under the second patent being the same or the equivalent of those used under the first patent, any alleged change therein being designed merely to enable the defendant to appear to employ different materials, while in substance and effect the same; his dealings also with the plaintiff, after he had procured the second patent, were on the footing that the plaintiff was to have the same interest therein as in the first patent.

A claim by the plaintiff that he was entitled to the benefit of the second patent as an improvement within the meaning of the first patent under the terms of the assignment was upheld.

Judgment of FALCONBRIDGE, J., affirmed.

*S. C. Smoke*, for the plaintiff.

*Welton*, for the defendant.

[5TH SEPTEMBER, 1899.]

## BROWN v. GRADY.

*Infant—Mortgage—Covenant for payment—Approval of Master—Mistake—Repudiation—Delay.*

In taking a trustee's accounts before the Master it was found that there was due to the trustee for compensation and costs a sum which was declared to form a lien on the trust estate. It was declared to be disastrous to sell the lands at that time, and the Master directed the trustee to mortgage them to pay off the lien. The defendant in this action was one of several *cestuis que trust*, and it was recited in the mortgage deed, which they executed, that they had agreed to join therein in order to vest all their interests in the mortgagee, but subject to the terms of the mortgage. The defendant was then an infant under nineteen years of age, but that fact did not appear on the face of the instrument, in which she was made to covenant for payment of the mortgage money. The instrument was marked "approved" by the Master, but not by the official guardian. It was stated, however, at the bar, that the latter did approve, and that some pencil marks on the instrument signified his approval. No order was shewn requiring execution by the infant. Nearly two years after the defendant came of age she was served with a writ of summons in this action by the mortgagee upon the covenant for payment, and, as she did not appear, judgment was signed against her. Two years later she moved to have the judgment set aside.

*Held*, by BOYD, C., and affirmed by the Court, that the circumstances justified the mortgage, but not the personal covenant of the infant; it was contrary to all proper practice to have such a covenant on the part of an infant; and its presence was only to be explained by supposing that the Master's attention had not been called to the fact of infancy. The covenant was void, as the infant had received no benefit from it and had been induced to enter into it *per incuriam*; and the delay was not material—the applicant being ignorant of her rights and not called on to disaffirm what was from the outset to her prejudice.

*F. E. Hadgins*, for the plaintiff.

*J. R. Roaf*, for the defendant.

[6TH SEPTEMBER, 1899.

*In re* ROSEDALE PRESSED BRICK AND TERRA COTTA COMPANY.

## FOSTER'S CASE.

*Company—Contributory—Subscription before incorporation—Subsequent allotment—Continuing offer.*

An appeal by the liquidator of the company from an order of the Master in Ordinary dismissing an application by the liquidator to settle the name of Edward H. Foster upon the list of contributories of the company in respect of ten shares.

The alleged contributory signed the stock-book before the incorporation of the company, and the shares were allotted to him after the incorporation. There was, however, no proof of formal notice of allotment, though there was a correspondence between the alleged contributory and the secretary of the company in which the latter insisted that the former was a shareholder.

The Master held, following *Tilsonburg Mfg. Co. v. Goodrich*, 8 O. R. 565, that subscription before incorporation was of no avail unless there was a subsequent ratification, and there was none such here, and the alleged contributory was not a shareholder by estoppel.

*Aylesworth*, Q.C., for the appellant, contended that the subscription was a continuing offer to take shares, and when it was accepted after incorporation it became a contract.

*Allan Cassels*, for the alleged contributory, contra.

The Court was unable to distinguish this case from the *Tilsonburg* case, and therefore dismissed the appeal with costs.

[7TH SEPTEMBER, 1899.

## HOFFMAN v. CRERAR.

*Judgment—Default—Writ of summons—Special indorsement—Nullity—Abandonment of action—Joint contractors—Release of some after judgment—Effect of—Costs.*

Upon an appeal by the plaintiff from the order of

ARMOUR, C.J., 18 P. R. 473, *ante* 235, reversing an order of the local Judge at Stratford, and staying proceedings upon judgments recovered and executions issued against certain of the defendants, counsel for the latter offered to pay the plaintiff such amount as, with the sums already paid, would make \$116, for which judgment was recovered.

THE COURT, in view of this offer, affirmed the order of ARMOUR, C.J., upon the ground that the plaintiff could not recover more than \$116, but directed that the order should be so framed as to make it plain that the plaintiff was entitled to proceed for costs.

*D. L. McCarthy*, for the plaintiff.

*J. H. Moss*, for the defendants.

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[BOYD, C., MEREDITH, J., 1ST SEPTEMBER, 1899.]

*In re* ALEXANDER.

*Appeal—Divisional Court—Order of Surrogate Judge—Compensation to executors.*

*Held*, that an appeal lies to a Divisional Court under R. S. O. c. 59, s. 36, from an order of a Surrogate Court Judge allowing compensation to an executor under the Trustee Act, R. S. O. c. 129, s. 43.

The sections have become separated in the course of statutory consolidation and revision, but both are of one original (Surrogate Courts Act, 1858, ss. 20 and 47) and are still *in pari materia*, and are to be read together as forming one subject-matter. The Trustee Act does not make the Surrogate Court a *persona designata*, from whose decision there is no appeal.

*C. J. Holman*, for the appellants.

*Shepley*, Q.C., and *H. P. O'Connor*, Q.C., for the respondents.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 11TH SEPTEMBER, 1899.

*In re* CONFEDERATION LIFE ASSOCIATION AND  
CORDINGLY.

*Interpleader—Summary application—Rule 1103 (a)—Insurance moneys—Adverse claims—Foreign claimants—Notice of motion—Service out of jurisdiction—Rule 162 (3).*

Certain moneys were payable by an insurance company under several life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order.

*Held*, reversing the decision of MEREDITH, C.J., *ante* 305, that they were not entitled to avail themselves of the provisions of Rule 1103 (a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons, because no action was brought or threatened within Ontario, and the claimants would not be bound by any order that might be made; and therefore service out of Ontario of the company's notice of motion for the interpleader order should not have been allowed under Rule 162 (3) or otherwise.

*J. J. Maclaren*, Q.C., for Sarah E. Langridge.

*Snow*, for the association.

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[12TH SEPTEMBER, 1899.

*In re* ROCHON.

*Assignments and preferences — Examination of insolvent debtor — County Court Judge—Power to commit—R. S. O. c. 147, s. 36—" Court or Judge"—Prohibition—Appeal.*

An appeal by P. Rochon from an order of the junior Judge of the County Court of Carleton directing the committal of the appellant for unsatisfactory answers upon his examination as an insolvent debtor under the Assignments

Act, and a motion in the alternative for an order prohibiting the enforcement of the order, upon the ground that the Judge had no jurisdiction to make it.

*Held*, that the power to commit can be exercised only by the High Court or a Judge thereof, under the words "the Court or Judge" in s. 36 of R. S. O. c. 147, and the County Court Judge had no jurisdiction to make the order.

*Held*, also, that the proper remedy was prohibition.

Order made for prohibition. Appeal dismissed. No order as to costs.

*Aylesworth*, Q.C., for Rochon.

*Watson*, Q.C., for the assignee.

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[MEREDITH, C.J., 16TH JUNE, 1899.]

#### RAE v. RAE.

*Alimony—Desertion—Offer to receive wife back—Bona fides.*

In an action for alimony on the ground of desertion, in order to give effect to the husband's offer and willingness to receive back his wife, the Judge must be satisfied that it is made *bona fide*, and not merely set up to prevent the pronouncement of judgment against him.

*Crothers v. Crothers*, 1 P. & D. 568, referred to.

*Aylesworth*, Q.C., for the plaintiff.

*C. J. Holman*, for the defendant.

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[17TH JUNE, 1899.]

#### TOMPKINS v. BROCKVILLE RINK CO.

*Municipal corporations—By-law prohibiting erection of wooden building—Right to maintain action for breach of.*

Where a statute provides for the performance of a particular duty, and one of a class of persons for whose benefit and protection the duty is imposed is injured by the failure of the person required to do so, to perform it, an action *prima facie*, and if there is nothing to the contrary, is maintainable by such person; but not where the non-performance is, in the general interest, punishable by penalty.



Where, therefore, under authority conferred by s. 496, s.-s. 10, of the Municipal Act, a by-law was passed by the council of a town, setting apart certain areas as fire limits where no wooden buildings could be erected, and providing that buildings erected in contravention thereof might be pulled down and removed by the corporation at the cost of the owner, and a penalty of \$50 imposed, the erection of a wooden building within such limits does not give a right of action to the owner of contiguous property injuriously affected thereby; and an action therefor brought by such owner for the recovery of damages and claiming the removal of such building and for an injunction, was dismissed with costs.

*Aylesworth, Q.C., and M. M. Brown, for the plaintiff.*

*Shepley, Q.C., and W. S. Buell, for the defendants.*

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[15TH JULY, 1899.]

### PLAXTON v. BARRIE LOAN CO.

*Distress—Abandonment—Mortgage—Arrears of interest—Seizure of goods—Incompleteness of inventory—Proviso for redemption—Extension of time for payment—Assignment of mortgage—Swearing appraisers after appraisement—Sale under distress pending notice of exercising power of sale—R. S. O. c. 121, s. 31—Counterclaim—Excluding mortgagor—Possession.*

After a distress for arrears of interest under the clause therefor in a mortgage, the bailiff remaining in possession and having the key of the premises, the fact of the mortgagor being allowed as a matter of grace to go in and out of the premises for the purpose of carrying on some work, does not constitute an abandonment of the distress.

Where the evidence, in other respects, is clear that there was a seizure under the distress warrant of all of the goods, the fact of an incompleteness in the inventory merely, due to the mortgagor's action in the matter, cannot, of itself, displace the true facts of the seizure.

Where the time for payment of mortgage money is extended by an agreement, the proviso for redemption is to be read as a new and then existing proviso, so as to justify a distress for non-payment thereunder.

Where by the terms of assignment of mortgage authority is given to distrain for arrears of interest, the assignee may properly distrain for such arrears.

The fact of swearing the appraisers after making the appraisement is an irregularity and is a ground for damages only, and does not render the distress and subsequent proceedings invalid. No such ground was set up in the pleadings here, and, even if it had been, it was held that only nominal damages would have been allowed.

The sale under a distress warrant after notice of exercising the power of sale in the mortgage, and before the expiry of the period provided thereby, but after an order had been obtained from a Judge permitting the sale to take place under the distress warrant, is a valid one, and is not affected by R. S. O. c. 121, s. 31.

A claim for damages, by way of counterclaim, for excluding the mortgagor from the premises, was held to be not sustainable by reason of the mortgagee being entitled to possession on default, while, in any event, the possession here was with the mortgagor's consent.

*Rowell and C. W. Plaxton*, for the plaintiffs.

*Pepler, Q.C.*, and *J. A. McCarthy*, for the defendants.

[20TH JULY, 1899.]

*In re* ONTARIO INSURANCE ACT AND SUPREME  
LEGION SELECT KNIGHTS OF CANADA.

*Benevolent societies—Incorporation—By-laws—Liability to pay assessments—  
Withdrawal from membership—R. S. O. 1877 c. 167—R. S. O. 1897 c. 211.*

A benevolent society, incorporated under R. S. O. 1877 c. 167, attached to the declaration which they filed under s. 2, a printed book stated to contain a copy of the constitution and by-laws by which the society was to be governed.

*Held*, that the constitution and by-laws thus included in the declaration became by virtue of s. 2 (1), which is the same as R. S. O. 1897 c. 211, s. 3 (1), a part of the organic law of the society, and changes made in the by-laws in accordance with the provisions of such constitution were valid and binding.

*Held*, also, that the mere fact of a person being a member of such a society, so constituted, or of its beneficiary department, raises no implied contract that he will pay the dues and assessments which according to the rules of the society afterwards become due, and that, in the absence of a contract on his part to do so, there is no obligation to pay, for breach of which an action against him will lie. No such contract is implied in an agreement by an applicant for a beneficiary certificate, contained in his application, that compliance on his part with all the laws, regulations, and requirements which were or might be thereafter enacted by the order was the express condition on which he was to be entitled to participate in the beneficiary fund.

*Held*, also, that a suspended member is none the less a member of the society, and where there is a personal liability on his part to pay dues or assessments, that liability continues notwithstanding the suspension, not only as to dues and assessments payable at the time of the suspension, but also as to those which become payable during the suspension, and before, by the operation of the rules, his default results in his ceasing to be a member.

*Held*, also, that all conditions prescribed by the constitution in order to withdrawal from membership must be rigorously observed.

*W. R. Riddell, B. N. Davis, C. Elliott, and G. Grant*, for various appellants.

*J. Howard Hunter*, the Registrar of Friendly Societies, in person.

*D. F. MacWatt*, for the receiver.

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[ROBERTSON, J., 14TH JULY, 1890.]

### SNIDER v. McKELVEY.

*Medical practitioner—Agreement not to practise—Breach of—Right to damages and injunction.*

By an agreement under seal the defendant, a physician and surgeon, sold his medical practice in a village, with the good-will thereof, to the plaintiff for \$2,100, and bound

himself in the sum of \$400 to be paid to the plaintiff in case he should set up or establish himself during the space of five years within a radius of five miles of the village

*Held*, that the plaintiff was entitled to damages for breach of the agreement and an injunction restraining him from further breaches.

*W. M. Sinclair*, for the plaintiff.

*Garrow, Q.C.*, for the defendant.

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[MACMAHON, J., 5TH JULY, 1899.]

MEEK v. PARSONS.

*Free grant and homestead lands—Indirect alienation—Restraint on—Crown grantee—Mistake of title—Violation of statute—R. S. O. 1887 c. 25.*

One object of the Free Grants and Homestead Act, R. S. O. 1887 c. 25, is to conserve the interest of a wife from being sacrificed by a husband; and alienation of free grant land by the locatee before the issue of the patent, being prohibited by the statute, cannot be accomplished indirectly by entering into an agreement to complete the settlement duties, and after the patent is issued to convey.

The doctrine that when the fee is in the grantee there can be no restraint upon alienation, does not apply when the grant is from the Crown.

There could be no mistake of title where the contract of sale was obtained from a locatee in the face of and in direct violation of an express statutory provision.

*F. H. Keefer*, for the plaintiff.

*F. R. Morris*, for the defendant.

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[15TH JULY, 1899.]

BANK OF HAMILTON v. IMPERIAL BANK OF CANADA.

*Banks and banking—Alteration of cheque—Liability.*

B., having \$10.25 to his credit at the Bank of Hamilton, drew a cheque for \$5, which he presented at that bank and

had it marked good. The cheque had no figures before the dollar mark, and on the line for the written amount there was a long space between the word "five" and the word "dollar." B. then altered the cheque by writing "500" after the dollar mark and the word "hundred" after the word "five," and taking the cheque so altered deposited it at the Imperial Bank and opened an account there and got three cheques marked at that bank, namely, for \$300, \$150, and \$50, drawing out the amount of the \$150 cheque and negotiating the other two. The altered cheque of \$500 was sent by the Imperial Bank to the clearing house, and, under the system in vogue, it was charged against the Bank of Hamilton. On the following morning the Bank of Hamilton, discovering that no cheque for \$500 had been debited to B.'s account and that a forgery had been committed, immediately notified the Imperial Bank and demanded repayment of \$495, being the difference between the \$500 and the \$5 which had been debited to B. Under the system in force the forgery would not be discovered until the following morning, but it was said that under a different system it might have been discovered sooner.

*Held*, that the plaintiffs were entitled to recover.

*Osler*, Q.C., for the plaintiffs.

*Lash*, Q.C., and *Kappele*, for the defendants.

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[STREET, J., 14TH JUNE, 1899.]

### GOODERHAM v. MOORE.

*Indemnity—Purchase of land subject to mortgage—Right of indemnity—Assignment of—Claim on administrator—Service of notice—R. S. O. c. 139, s. 35—Action—Bar.*

At sale for \$275 of land on which there was a mortgage for \$1,100, the conveyance being by the ordinary short form deed, the only reference to the mortgage being in the covenant for quiet enjoyment, was, under the circumstances, held to have been a sale subject to the mortgage, against

which the vendor was entitled to be indemnified by the purchasers; and the plaintiff, having acquired an assignment of such right of indemnity, was entitled to enforce it against the purchasers.

Before the commencement of an action against the purchasers, one of them died, and on the plaintiff notifying the administrator of his claim he was served with a notice under s. 35 of R. S. O. c. 139, disputing it. An action was afterwards brought against such administrator, but, on it appearing that he was then dead, and that an administrator *de bonis non* had been appointed, an order was obtained amending the writ by substituting as defendant such administrator *de bonis non*, upon whom the writ was served, such service being more than six months after the service of the notice.

*Held*, that the proceedings against the defendant must be deemed to have commenced only on the service of the writ on him, and this being more than six months from the service of the notice, the plaintiff's action was barred.

*Wallace Nesbitt*, for the plaintiff. .

*W. A. J. Bell*, for the defendant John Moore.

*Pepler*, Q.C., and *J. A. McCarthy*, for the defendant Tinegate.

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[17TH JUNE, 1899.]

*In re* THOMPSON AND CITY OF TORONTO.

*Municipal corporations—Local improvements—Repair of street—Applicants for order—Status of.*

To obtain an order under R. S. O. c. 223, s. 666, as amended by s. 41 of 62 V. (2) c. 26, for the repair of a pavement on a street, which had been laid down as a local improvement, the applicant must be a ratepayer of property abutting on the street, and must be assessed for the work in question.

*Sydney B. Woods*, for the applicants.

*Fullerton*, Q.C., for the corporation of the city of Toronto.

## IN CHAMBERS.

[MEREDITH, C.J., 28TH JUNE, 1899.]

## WALKER v. GURNEY-TILDEN CO.

*Costs—Recovery against opposite party—Liability to solicitor—Indemnity.*

If the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party.

*Jarvis v. Great Western R. W. Co.*, 8 C. P. 280, and *Meriden Britannia Co. v. Braden*, 17 P. R. 77, followed.

This rule applied to a case where the defence to an action for damages for personal injuries sustained by a workman in the employment of the defendants was undertaken by a guarantee company who had contracted to indemnify the defendants against such claims, and who employed their own solicitors to defend the action, exercising a right given by the contract; and extended, beyond the actual costs of the defence, to subsequent costs arising out of an application made by the plaintiff's solicitors, where the defending solicitors continued to act upon the retainer of the guarantee company.

*Washington*, for the plaintiff's solicitors.

*J. H. Denton*, for the defendants.

[FALCONBRIDGE, J., 24TH AUGUST, 1899.]

*In re* ASKWITH.

*Criminal law—Evidence—Liquor License Act—Witness—Refusal to answer question—Criminating answer—Committal.*

Motion by Charles H. Askwith for an order for the issue of a writ of *habeas corpus* directed to the keeper of the common gaol of the county of Carleton to have the body of the applicant before the Court, and for the issue of a writ of *certiorari* in aid, and for the discharge of the applicant from custody.

One Michel Delorme was charged before the police magistrate for the city of Ottawa with selling intoxicating liquor on Sunday the 21st May, 1899, in his hotel in Ottawa, contrary to the Liquor License Act, and the applicant, a journalist, was summoned to appear as a witness on behalf of the prosecution. He did so appear on the 10th June, and was duly sworn, but refused to answer the question whether he was at the defendant's hotel in the city of Ottawa on the Sunday in question, on the ground that the answer might tend to incriminate him. Proceedings were then enlarged till the 13th June, when the magistrate again submitted the question, and the applicant then declined to answer on the same ground, whereupon the magistrate "adjudged the applicant to be committed to the common gaol of the county of Carleton, there to remain until he consents to answer the said question."

The applicant filed an affidavit setting forth the facts, and stating that he was satisfied that if an answer was given by him to the question, such answer would tend to subject him to prosecution for a penalty under the provisions of the Liquor License Act.

*George F. Henderson*, for the applicant.

*Glyn Osler*, for the magistrate.

*R. J. Sims*, for the complainant.

FALCONBRIDGE, J.—If the applicant had the right to maintain and rely on his objection, it is quite clear that the objection was sufficiently taken, and I am also clearly of the opinion, under the circumstances, that his objection is likely to be well founded, for by s. 57 of the Liquor License Act it is an offence, with certain exceptions, to be found in a bar-room during prohibited hours. Therefore his declaration on oath before the magistrate, repeated in his affidavit, that he believes the answer will tend to criminate him, will protect him from answering unless, as is contended by the prosecution, the language of s. 115 of the Liquor License Act is of force sufficient to abrogate a rule of great antiquity which has been universally recognized by all British Courts, whether exercising civil or criminal jurisdiction. Section 115 is as follows: "In any prosecution under this



Act the . . . magistrate trying the case may summon any person represented to him . . . as a material witness . . . and if he refuses . . . to answer any question touching the case, he may be committed to the common gaol of the county, there to remain until he consents to . . . answer." Any statute which appears to take away, change, or diminish a common law right should be strictly construed: Endlich on Interpretation of Statutes, s. 127; Maxwell, 3rd ed., p. 399. Under the Evidence Act, R. S. O. c. 73, there seems to be no escape for the defendant or his or her wife or husband: *Regina v. Fes*, 13 O. R. 590; *Regina v. Nurse*, 2 Can. Crim. Cas. 57. In the latter case the learned senior Judge of the County Court of York discusses the subject fully, and expresses the opinion that "any other witness except the defendant, his wife or husband, as the case may be, can, however, avail himself of the protection afforded by s. 5 of the Evidence Act of Ontario, and if the answer to the question would tend to subject him—the witness—to criminal proceedings, or to a prosecution for a penalty, he can decline to answer." With this opinion I agree. The refusal "to answer any question touching the case" in s. 115 must mean any question which may be lawfully put, and which the witness is otherwise bound to answer. It is suggested that without the aid of the section the magistrate might not be able to enforce the answering of proper questions.

There will be an order for the discharge of Charles H. Askwith from the custody of the keeper of the common gaol of the county of Carleton or from the custody of such other person as may have him in charge. No order as to costs.

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[28th August, 1899.]

*In re O'REILLY.*

*Parent and child—Custody of infants—Separation of father and mother—Religious faith—Ante-nuptial agreement.*

Application by Edward O'Reilly, upon the return of a *habeas corpus*, for an order for delivery to him of his two

infant children, boys of nine and six, by his wife, Eliza O'Reilly, formerly Eliza Petrie, and petition by the wife under the statute for an order awarding her the custody of the infants.

The applicant, being a Roman Catholic, in 1889 married the respondent, a Presbyterian. The rite was that of the Roman Catholic church. Before the marriage the intended wife signed the following writing: "Promise in mixed marriage re E. O'Reilly and Eliza Petrie. I, the undersigned Eliza Petrie, not a member of the Catholic church, wishing to contract marriage with Edward O'Reilly, a member of the Catholic church, propose to do so with the understanding that the marriage bond thus contracted is indissoluble except by death; and I promise that Edward O'Reilly shall be permitted the free exercise of religion according to the Roman Catholic faith, and that all children of either sex born of this marriage shall be baptized and educated in the faith and according to the teachings of the Roman Catholic church, even if Edward O'Reilly should be taken away by death. I furthermore promise that no other marriage ceremony than that by the Catholic priest shall take place."

Only two children were born of the marriage, the two boys now in question, the younger of whom was a nervous, delicate, and physically weak child, but at the time of the application his condition had improved and was improving under his mother's care. Disputes and difficulties arose between husband and wife. He met with reverses in business, and since about the end of 1894 she had kept a boarding-house in the city of Ottawa. He lived in the house for part of the time, and finally left it in December, 1895. Before and since that time he appeared to have furnished some supplies to the house, but she had practically maintained herself and her children, with some assistance from her mother.

*Mahon*, for the father.

*Chrysler*, Q.C., for the mother.

FALCONBRIDGE, J.—On the evidence there is more reason to doubt the ability of the husband to support the chil-

dren than that of his wife. As to the charges against the wife of improper and immoral conduct, a jury would not be justified in finding them to be proven, against the denial and explanation of the accused woman. A bundle of letters written by the husband to the wife from July, 1895, over a period of two years, was produced. These letters were for the most part very abusive of the wife and her mother and sister; they contained charges of the grossest immorality, couched in language of the foulest and plainest description. I would hesitate to commit the care, management, and education of young children to the writer of those letters; and, having regard to the state of health of the younger child, it would not be in his interest to take him from his mother, and the boys ought not to be separated. *Prima facie* children ought to be brought up in the father's religion, and the husband has by the law of England an absolute right, except under very special circumstances, to have them so brought up — a right which continues after his death, and though he has left no directions in the matter.

Then the wife seems to have surrendered her rights, if she had any, by the ante-nuptial agreement. That agreement may be binding on her. There is no authority on the point. At any rate, it fortifies the husband's legal position, if it needs fortifying. The father could not by such an agreement release his right. He cannot bind himself conclusively to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own.

Application of father refused, and order made giving the custody of the children to the mother, subject to a declaration that they are to be brought up in the Roman Catholic faith, and subject to the father having access to them at reasonable times. No costs.

## NOVA SCOTIA.

## In the Supreme Court.

[RITCHIE, J., 25TH AUGUST, 1899.]

## MICHAELS v. MICHAELS.

*Husband and wife—Promissory note of husband—Indorsement to wife—Recovery on—Contract—Separate property—Married Women's Property Act, 1884—Form of indorsement.*

The defendant was very largely indebted to the Bank of Nova Scotia for discounts, the greater part of which had not matured when this action was brought and judgment therein recovered against the defendant by his wife for about \$13,000, under the circumstances mentioned below. No defence was entered by the defendant, and judgment was signed for default. Subsequently the Bank of Nova Scotia were allowed to open up the judgment and defend the action in the name of the defendant, and a trial accordingly was held before RITCHIE, J., without a jury.

*J. M. Chisholm and H. Mellish, for the plaintiff.*

*W. B. A. Ritchie, Q.C., and Joseph A. Chisholm, for the defendant.*

RITCHIE, J.—The action is brought by the indorsee of a promissory note, payable on demand, against her husband, the maker of the note, to recover the amount due thereon. In June, 1892, the defendant purchased from Mrs. Jennie Levy her interest in the firm of Levy and Michaels, and as a part of the consideration for the purchase gave her the note in question, payable to her order. Very shortly after the note was given, Jennie Levy, who is a sister of the plaintiff, gave the note to the plaintiff as a present, indorsing and delivering it to her at the time.

An objection was raised that the note had not been legally indorsed, because the words "payable to the order of Clara Michaels" were indorsed on it above the signature of Jennie Levy, instead of the words "pay to the order." etc.; but, in my opinion, the indorsement is sufficient. No particular form is required, and I think the words used imported an intention to transfer the note at that time.

No doubt, an action such as this is *ex contractu*, and the plaintiff's right to recover is based entirely upon the contract entered into by the defendant, at the time he signed and delivered the note, with Jennie Levy, the payee, and the subsequent indorsees, whoever they might be.

The defendant's counsel contended that the plaintiff could not recover because a married woman was, at the time the note was indorsed, powerless to contract except with relation to her separate property, and at all events there could be no such contract between husband and wife. The plaintiff and defendant were married in March, 1878.

The Married Women's Property Act, 1884, which was in force when this note was indorsed to the plaintiff, does not expressly authorize a contract like this, and s. 81 provides that nothing in the Act contained shall authorize any married woman to make a contract with her husband other than in the Act expressly mentioned.

[Reference to *Moore v. Jackson*, 22 S. C. R. 21; *Foster v. Hartlen*, 27 N. S. Reps. 357; *Woodward v. Woodward*, 3 DeG. J. & S. 674; *Butler v. Butler*, 16 Q. B. D. 374; *McGregor v. McGregor*, 21 Q. B. D. 424; *Richards v. Richards*, 2 B. & Ad. 447; *Philips v. Barnet*, 1 Q. B. D. 436; *Haley v. Lane*, 2 Atk. 181; *Abbott v. Winchester*, 105 Mass. 115; *Jackson v. Banks*, 10 Cush. 550; *Roly v. Phelan*, 118 Mass. 548.]

If the Married Women's Property Act, 1898, were in force, it would probably remove all plaintiff's difficulties, but it has no application to this promissory note, the title to which accrued to the plaintiff, if at all, long before the commencement of that Act.

Action dismissed with costs.

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### IN CHAMBERS.

[RITCHIE, J., 1ST AUGUST, 1899.]

### CROWE v. CABOT,

*Easement—Light—R. S. N. S., 5th ser., c. 112, s. 28—Prescription—Inference—Rebuttal—Unity of possession and ownership—Lost grant—Inference of—Evidence—Injunction—Convenience.*

Application by the plaintiff for an injunction to restrain the defendant from erecting a building on land adjoining

the plaintiff's building which would block up the plaintiff's windows.

There had been unity of possession and ownership of the two lots from 1834 till the 17th March, 1840. On the latter date the common owner sold one lot to the person from whom the defendant subsequently purchased, and on the 25th March, 1841, he sold the other lot to the person from whom the plaintiff subsequently purchased.

*Held*, that s. 28 of R. S. N. S., 5th ser., c. 112, is the only section of that chapter applicable to the easement of light: *Wheaton v. Maple*, [1893] 3 Ch. 49.

2. That under the provisions of c. 44 of the Acts of 1860, as extended by c. 39 of the Acts of 1863, it was not sufficient for the plaintiff to show that he had enjoyed the easement of light for twenty years prior to the 12th May, 1860, but that any inference that might be drawn from the continuous enjoyment of such an easement for twenty years may be rebutted and disproved.

3. That, it having been shown that there was unity of possession and ownership in 1840, the defendant had rebutted and disproved any inference to be drawn in the plaintiff's favour by the twenty years' enjoyment, and that the plaintiff therefore had not shown a prescriptive right: *Cross v. Lewis*, 2 B. & C. 686; *Bright v. Walker*, 1 C. M. & R. 211; *Mounsey v. Ismay*, 3 H. & C. 486; *Norfolk v. Arbulnot*, 5 C. P. D. 390; *Dalton v. Angus*, 6 App. Cas. 740; *DeLaWarr v. Miles*, 17 Ch. D. 590; *Bass v. Gregory*, 25 Q. B. D. 481; *Wheaton v. Maple*, [1893] 3 Ch. 48.

4. That the Court would not infer a lost grant under the evidence.

5. That there was doubt whether it had been shown that the windows in question occupied the same position now as the windows in 1840, and, without deciding that the plaintiff had no easement, the balance of convenience was in favour of allowing the erection of the building to proceed.

Application for injunction refused.

*McInnes*, for the plaintiff.

*Harris*, Q.C., for the defendant.

[22ND AUGUST, 1899.]

## REGINA v. McDEARMID.

*Justice of the peace—Warrant of commitment—Defect—Recommitment—Grand jury—Jurisdiction—Discharge of prisoner—Habeas corpus—Return.*

On the 19th April, 1899, the prisoner was committed to gaol by three justices of the peace "until discharged in due course of law" to stand his trial for an alleged forgery. The warrant of commitment being palpably bad, the gaoler, upon legal advice, refused to hold the prisoner under it, and the latter went at large.

During June, 1899, the depositions taken before the justices were submitted to the grand jury for the county, and the presiding Judge instructed them in regard thereto, but no witnesses came forward, and the grand jury dropped the matter, neither finding a "true bill" nor "no bill."

On the 10th August, 1899, the prisoner was again arrested and lodged in gaol under a warrant of commitment dated the 6th May, 1899, and signed by one only of the three justices who had originally examined and committed him. The commitment charged "that he has been in the habit of drawing documents without authority and forging names to public commissions, thus fraudulently obtaining public money and using it, in my belief, for his benefit.

This commitment was defective in not setting forth when and where the offence was committed.

The prisoner was not brought before any justice before or after his second arrest.

Upon the return of a *habeas corpus* he was unconditionally discharged.

*Held*, that the return of the gaoler, under the Liberty of the Subject Act, R. S. N. S., 5th ser., c. 117, must be directed and addressed to the Judge who grants the order in the first instance, and must contain no matter other than a mere statement of the date and cause of the detention, exhibiting the commitment; and any other return must be amended.

*W. F. O'Connor*, for the prisoner.

No one appeared contra.

## NEW BRUNSWICK

In the Supreme Court.

IN EQUITY.

[BARKER, J., 15TH AUGUST, 1899.]

CRONKITE v. MILLER

*Parties—Suit by married woman—Husband—Next friend.*

A bill relating to separate property of a married woman filed in the name of herself and husband is demurrable. Such suit should be in the name of her next friend, or since the Married Women's Property Act, 1895, in her own name, or in the name of her next friend.

*F. St. John Bliss, for the defendant.*

## MANITOBA.

In the Queen's Bench.

[KILLAM, C.J., 10TH AUGUST, 1899.]

DICK v. WINKLER.

*Landlord and tenant—Illegal distress—"Rent," how payable—Distress after expiration of tenancy—Liability of landlord for bailiff's acts.*

The statement of claim alleged that the defendant wrongfully seized certain of the plaintiff's goods and sold them under colour of distress for rent, when there was no rent due, and converted the proceeds thereof to his own use. The defendant denied the allegations, pleaded "not guilty by statute," 11 Geo. II. c. 19, and justified the taking by way of distress for rent of land held by the plaintiff as tenant to the defendant. He also set up a counterclaim for breach of covenants in the lease.

The defendant entered into a verbal agreement to sell to the plaintiff a parcel of farm land, and gave him pos-



session under the agreement. The plaintiff held possession for some years, but failed to make the agreed payments.

The defendant, being dissatisfied with the position of affairs, drew up an indenture of lease of the land from himself to the plaintiff, and it was executed by both parties. It bore date the 14th March, 1898; the defendant demised the land to the plaintiff for seven months from the 1st March, 1898.

The reservation of rent was as follows:—"Yielding and paying therefor yearly and every year during the said term unto the said lessor rent by faithfully fulfilling the following preamble: Provided, however, that the lessee shall sow in wheat not less than 250 acres and the balance of 70 acres in coarse grains. The lessee also agrees to deliver all the wheat at elevator from the threshing machine, and that the lessee will deliver all the wheat in the name of E. Winkler, the lessor herein. The lessee agrees that the lessor shall sell the wheat and retain one-half of the proceeds himself and the balance to be paid over to the lessee."

The plaintiff raised upon the land in 1898 a quantity of wheat. Presumably this was cut before the end of the term, but it was not threshed until October or November; the quantity was about 2,800 bushels. The plaintiff remained in possession after the expiration of the term of seven months. The defendant gave him no express permission to remain, but the defendant knew that he was there and expected to receive the grain being threshed upon the land.

The plaintiff delivered certain of the wheat at an elevator designated by the defendant, who received the proceeds. In March the defendant served upon the plaintiff a written demand for possession of the property, but the plaintiff remained in possession, and on the 3rd April the distress complained of was made by a bailiff assuming to act under a written warrant signed by the defendant. The warrant bore date the 3rd March, and authorized a distress to cover \$584.25 as the arrears of rent. This amount was computed by charging the plaintiff with 1,400 bushels of wheat at 50c. a bushel, and crediting him with the sums received. After the seizure the goods were taken away and sold, and the defendant received \$506 as the proceeds.

It was contended for the plaintiff that there was no rent due for which there could be a distress or sale of goods, because of uncertainty of the time of payment and of the amount payable in money, and that the distress was illegal, because made more than six months after the expiration of the term of the lease.

The defendant admitted having learned of the fact of the distress after it had been made and before the sale, but there was no evidence of his knowledge of the date of the seizure.

*Held*, that there was a right of distress; the time was fixed by reference to the threshing. "Rent" must be a profit, yet there is no occasion for it to be a sum of money: Blackstone, Com. 41. By 8 Anne c. 18, ss. 6, 7, the time for distress was extended for a period of six months from the determination of the tenancy, provided the landlord's reversion and the tenant's possession continued. Here the term was one of seven months from the 1st March, 1898, which would expire on the 1st October, 1898, so that the six months would be up on the 1st April, 1899.

The seizure was illegal when it was made. The warrant bore date the 3rd March. While the time within which it was to be executed was not limited, it should not be deemed to have authorized a distress after the expiration of the period within which a distress was lawful.

It was not shown that the defendant when he accepted the proceeds knew the date of the seizure; but he learned of the fact of seizure after it had been made and before the sale. It must be inferred that he knew the law as to the limit of time for distraining, and that he meant to take upon himself the risk of any irregularity and to adopt all the bailiff's acts: *Lewis v. Read*, 13 M. & W. 834.

Judgment for the plaintiff for \$1,150 with costs, and for the defendant upon his counterclaim for \$350 without costs; the amount to be deducted from that allowed the plaintiff.

*David Forrester and Donald Forrester*, for the plaintiff.

*Elliott*, for the defendant.

## ONTARIO.

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### Supreme Court of Judicature.

#### COURT OF APPEAL.

MEREDITH, J.]

[20TH SEPTEMBER, 1899.]

#### *In re* POWERS AND TOWNSHIP OF CHATHAM.

*Municipal corporations—By-law—Repeal—Public Schools Act, R. S. O. c. 292, ss. 38, 39—Alteration of school sections—Township council—County council—Appeal.*

An appeal by the corporation of the township of Chatham from the order of MEREDITH, J., 29 O. R. 571, 18 Occ. N. 327, was dismissed with costs, the Court agreeing with the judgment in the Court below.

*J. S. Fraser*, for the appellants.

*Aylesworth*, Q.C., and *A. B. Carscallen*, for the respondent.

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DRAINAGE REFEREE.]

[12TH SEPTEMBER, 1899.]

#### *In re* TOWNSHIP OF ROCHESTER AND TOWNSHIP OF MERSEA.

*Drainage—Branch drains—Separate assessment—Amendment of engineer's report.*

Where it is essential for the purpose of draining the area in question, a drainage work may include such branch drains as may be necessary, and the main drain and branches may be repaired and enlarged in case of necessity under one joint scheme and joint assessment, a separate scheme and separate assessment for the main drain and for each branch not being necessary.

Under s.-s. 3 of s. 89 of the Municipal Drainage Act, R. S. O. c. 226, the Drainage Referee has jurisdiction, with

the consent of the engineer and upon evidence given, to amend the engineer's report by charging against the townships in question for "injuring liability" assessments erroneously charged against them by the engineer for "outlet liability."

Judgment of the Drainage Referee reversed.

*M. Wilson*, Q.C., and *J. G. Kerr*, for the appellants.

*A. H. Clarke* and *M. K. Cowan*, for the respondents.

## HIGH COURT OF JUSTICE.

[BOYD, C., ROBERTSON, J., 4TH MAY, 1899.]

### BONN v. BELL TELEPHONE CO.

*Telephone—Poles on street—Supervision of municipality—Interference with public travel—Liability.*

A telephone company, having permission by its Act of incorporation to erect poles in the streets of towns and incorporated villages, so as not to interfere with the public right of travel, is not relieved from liability for damages when it plants the poles in the highway in such a manner as to become an element of danger to the public, although, as required by the Act of incorporation, the poles are planted under the supervision of the municipality.

*J. S. Fraser*, for the plaintiffs.

*M. Wilson*, Q.C., for the defendants.

[ARMOUR, C.J., STREET, J., 19TH SEPTEMBER, 1899.]

### CANADIAN BANK OF COMMERCE v. PERRAM.

*Promissory note—Indorsement by stranger—Subsequent indorsement by payee—Liability of stranger.*

An appeal by the plaintiffs from the judgment of the County Court of York dismissing an action brought upon a promissory note made by the Home Journal Publishing Company in favour of the plaintiffs as payees, and indorsed

by the defendant, and delivered to the plaintiffs, who then indorsed it without recourse, and afterwards brought this action to recover the amount of it.

*Held*, that the note having been indorsed by the plaintiffs, the payees, before the defendant put his name on the back of it, he incurred no liability in respect of it; he did not become liable as an indorser under the law merchant, nor did he become liable as a surety because of the Statute of Frauds.

*Jenkins v. Coomber*, [1898] 2 Q. B. 168, *Steele v. McKinlay*, 5 App. Cas. 754, *Macdonald v. Whitfield*, 8 App. Cas. 733, *Lecaen v. Kirkman*, 6 Jur. N. S. 17, and *Singer v. Elliott*, 4 Times L. R. 524, followed in preference to *Peck v. Phippon*, 9 U. C. R. 73, and *Duthie v. Essery*, 22 A. R. 191, the former cases being of higher authority, and this being the ultimate court of appeal in a County Court case.

*Held*, also, that if it were true that the note was made payable to the plaintiffs through inadvertence, the Court could not relieve against such inadvertence.

*Held*, further, that the Court could not infer from the circumstances an implied authority to the plaintiffs to indorse the note *nunc pro tunc* in order to cure the irregularity.

Appeal dismissed with costs.

*A. W. Anglin*, for the plaintiffs.

*Kyles*, for the defendant.

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[ARMOUR, C.J., STREET, J., 26TH SEPTEMBER, 1899.]

*In re* YOUNG AND TOWNSHIP OF BINBROOK.

*Municipal corporations—By-law—Voters' lists—Omission of classes of voters—Irregularity—Saving clause.*

A by-law prohibiting the sale of intoxicating liquor in the township, under the provisions of s. 141, R. S. O. c. 145, was submitted to the vote required by that section and a majority of 98 votes appeared in its favour. Upon motion to quash the by-law it was objected that the names of some 80 persons entitled to vote were omitted from the

lists furnished to the deputy returning officers, and that these persons had no opportunity of voting. The clerk who prepared the lists was under the impression that only those persons were entitled to vote who would be entitled to vote upon money by-laws, and he therefore left out all farmers' sons and income voters. The number of persons entitled to vote at municipal elections was 490, of whom 78 were farmers' sons and 2 income voters, the remainder being owners and tenants. Only 409 names appeared upon the lists given to the deputies; 272 persons actually voted, 185 for the by-law and 87 against it.

*Held*, following *In re Croft and Town of Peterborough*, 17 A. R. 21, and *In re Pounder and Village of Winchester*, 19 A. R. 684, that the names of the farmers' sons and income voters were improperly omitted from the lists.

*Held*, however, that the omission was not so serious an irregularity as to require that the Court should quash the by-law.

Under s. 204 of the Municipal Act the by-law must stand if it should appear to the Court "that the election was conducted in accordance with the principles laid down in the Act," and that the irregularity did not affect the result.

An election should be held to have been conducted in accordance with the principles laid down in the Act, when the directions of the Act have not been intentionally violated, and when there is no ground for believing that the unintentional violation has affected the result; and that was the state of things presented in this case.

The Court was bound to assume that all the persons left off the list would have voted against the by-law; but was not bound to assume that the error had any effect upon the minds of the persons upon the lists who voted or abstained from voting, in the absence of any evidence to shew that such was the case; and, adding the 80 votes to the 87, there was still a majority in favour of the by-law.

*Woodward v. Sarsons*, L. R. 10 C. P. 733, followed.

*Haverson*, for Robert Young.

*J. J. Maclaren*, Q.C., and *E. F. Lazier*, for the township corporation.

[Moss, J.A., 7TH JULY, 1897.]

ZIMMERMAN v. WILCOX.

*Trustee—Administratrix — Guardian — Accounting — Occupation rent — Interest—Timber, cutting of—Neglect and default—Maintenance of infant—Allowance for—Compensation to guardian—Conditional allowance of—Rental of house—Charging trustee with—Agreement—Failure to collect securities—Onus—Necessaries for infant—Interest on yearly balances—Failure to keep accounts—Costs of appeal from Master's report—Apportionment—Costs of action for administration—Judgment on further directions—Form of.*

An appeal by the defendant from the report of the Master at St. Catharines dated the 15th April, 1897.

The plaintiff was the only daughter of one Alexander Patterson, who died intestate on or about the 27th March, 1897. The defendant was his widow, and the mother of the plaintiff. The latter was about twenty-three months old at the time of her father's death. Letters of administration of the personal estate of the intestate were granted to the defendant on the 16th April, 1877. On the 19th June of the same year she was, upon her own petition, appointed guardian of the plaintiff, who continued to reside with her and under her care until the month of March, 1895, when the plaintiff was married to James E. Zimmerman, her present husband, and this action was shortly afterwards begun.

The defendant in December, 1878, was married to one Milton Wilcox.

At the time of his death the intestate was possessed of a farm of 100 acres in the township of South Grimsby, and of some considerable personal property, consisting of farm stock, implements, grain, household furniture, cash, and securities, which came to the defendant's hands.

From the time of the death of the intestate until the time of the defendant's marriage with Wilcox, she and the plaintiff continued in occupation of the farm, and from the time of the marriage, she and her husband and the plaintiff continued in occupation of the farm until the year 1888, when they removed from it, and it was afterwards rented.

The action was for the administration of the real and personal estate of the intestate, and for an account of the defendant's dealings therewith as administratrix, and also for an

account of her dealings as guardian of the plaintiff during her minority.

The judgment pronounced on the 1st June, 1895, referred it to the Master to take and make the usual administration accounts and inquiries in respect of the personal and real estate of the intestate, and also an account of the rents and profits of the real estate received by the defendant as guardian of the plaintiff, and a statement and account of her dealings as such guardian with the plaintiff's property, and generally to take all accounts necessary to fully investigate the dealings of the defendant with the intestate's estate, and also to fully investigate the defendant's dealings as the plaintiff's guardian, and to fix the commission to be allowed to the defendant for services as administratrix and as guardian of the plaintiff.

The Master made a report, from which the present appeal was taken upon many grounds, of which the following, with the decision upon each, are of importance:—

1. That the Master charged the defendant with interest upon the occupation rent, and also with interest upon the value of certain pine trees, which he had charged against her.

*Held*, that the defendant's duty was to have rented the farm to a proper tenant, and, having received the rent from time to time, to make such use or investments of it for the plaintiff's benefit as were available. Instead of doing this, she chose to occupy the farm herself, and with her second husband to work it for their mutual benefit and advantage. It was also her duty to have preserved the timber upon the estate and not permitted it to be cut down, or, if the circumstances made it advisable, or she deemed it of advantage to dispose of it, to see to the receipt of the proceeds and the using of them for the benefit of the plaintiff. And the same duty existed in regard to the pine trees blown or fallen down. But, according to the evidence, the plaintiff permitted her second husband not only to dispose of the trees that were lying down, but allowed him to cut down standing trees and dispose of the timber—the proceeds of which, or the benefit thereof, were received by the defendant. In respect of both the occupation rent and the proceeds of the trees, there was a distinct act in breach of the trustee's duty, and there was no



reason why she should be permitted to occupy the same position as a trustee who, through neglect and default, has allowed a debt due to the trust estate to be lost, or to claim that she should not be charged with interest because the amount with which she was charged was not an interest-bearing debt until it was fixed in the Master's office. She was to be regarded as having the amounts in her hands; otherwise she would be benefiting by her own wrongful breach of duty.

*Sovereign v. Sovereign*, 15 Gr. at p. 563, *Vanston v. Thompson*, 10 Gr. 512, *Blain v. Terryberry*, 12 Gr. 221, *Crowter v. Crowter*, 10 O. R. 159, and *Horton v. Brocklehurst*, 29 Beav. at p. 512, referred to.

Exception disallowed.

2. That the sum allowed by the Master for outlay for the plaintiff's maintenance, clothing, and education, was insufficient. He allowed \$60 a year from the date of the death of the intestate until March, 1887, when she was nearly twelve, and from then until March, 1891, when she was nearly sixteen, he allowed \$75 a year, and from then until March, 1895, when she married, he allowed \$35 a year, making \$1,040 in all. No account was kept by the defendant of her disbursements for the clothing or education of the plaintiff, nor of the moneys she gave her from time to time. The plaintiff did the work usually done by a girl of her age living upon a farm with her parents, and for several years there was no hired female assistant, all the women's work being done by the defendant and the plaintiff.

*Held*, that, having regard to the facts that the parties were living together on a farm for the greater part of the time, where the chief outlay would be clothing and pocket money, and to facts that the plaintiff attended the public school free of expense, and that the outlay for school books was trifling, the finding of the Master could not be interfered with upon the evidence, although he might well have allowed a larger sum.

Exception disallowed.

3. That the compensation allowed to the defendant was insufficient. The Master allowed a commission of five per cent. on \$2,499.20 received and expended by her, and two and

a half per cent. on an additional sum of \$3,268.30 received, but not expended, and now found to be in the defendant's hands, or an allowance of \$208.66 for a period of eighteen years. This allowance did not take into account anything for care, trouble, and responsibility in respect of the plaintiff's person or property other than that involved in the receipt and disbursement of the above sums.

*Held*, that, although the plaintiff had not done her whole duty as a guardian and trustee, yet it appeared that she had cared for and educated the plaintiff in a manner befitting her status, and the allowance for outlay for this was not on a very liberal scale, and on the whole her treatment of the plaintiff had not been such as to afford ground for complaint, and she had kept the farm so that it now came to the plaintiff in a fairly good condition, and she was of ability to pay over to the plaintiff the amount found to be in her hands belonging to the plaintiff; and therefore some allowance ought to be made in respect of these matters, conditional upon the defendant paying or making good to the plaintiff the amount she would be entitled to receive; and \$300 should be credited to the defendant at the foot of the accounts upon her paying or making good to the plaintiff the amount found payable to her upon the adjustment of the accounts.

*Re Berkeley's Trusts*, 8 P. R. 193, followed.

Exception allowed to the extent indicated.

6. That the Master had improperly charged the defendant with a rental for the house on the farm for five years while the farm was under rental to P. The lease to P. reserved the dwelling-house and yard around it, and the road from the highway, and the fruit in the yard and around the house, to the plaintiff and her husband. In order to excuse herself for not renting the house and yard to a tenant during P.'s tenancy, the defendant proved a verbal agreement made with P. that the house was not to be rented to any one without his consent, and it was upon this understanding that P. became tenant. The evidence established that this was the case.

*Quaere*, whether, if the defendant had sought to let the house without P.'s consent, she might not have been restrained at his instance.

*Held*, at all events, that where it was sought to charge the defendant with wilful neglect and default in not letting the house, it was open to her to shew the existence of a reason, which, if not legally binding, was intended to be so, as one of the terms upon which P. was induced to become the tenant of the farm, the agreement being made in good faith, and it not being shown that it was improvident, or that without it as advantageous a lease could have been procured from others; the defendant was not obliged to violate the verbal agreement at the peril of being charged with wilful neglect and default.

Exception allowed.

8. That the Master charged the defendant with the amount of certain promissory notes, the property of the intestate, which she failed to collect, and with interest in respect of them.

*Held*, that the existence of the debt owing or security belonging to the estate casts the onus upon the personal representative of showing satisfactorily why it was not collected. The law presumes, until the contrary is shown, that the debtor could pay, and it lies on the executor or administrator to show that he has done all he can to obtain payment, but his efforts have not proved successful; and, applying these rules to the notes in question, the defendant had not satisfied the onus.

Exception disallowed.

11. That the Master disallowed the sum of \$125, cost of an organ which the defendant alleged was bought for the plaintiff when the latter was about eight years old.

*Held*, that for the eight year old daughter of a deceased farmer, living on the farm with her mother and step-father, an organ costing \$125 was not a necessary.

13. That the Master charged six per cent. interest on yearly balances.

*Held*, that, in view of the manner in which the defendant dealt with the estate, keeping no accounts, and making no endeavour to keep separate the plaintiff's moneys, but making use of all that came to her hands, and dealing with and treating it as if it all belonged to herself, the Master was

justified in holding her to an account on the footing of interest, at the legal rate, upon the yearly balances in her hands. This method of fixing the amount which the defendant is to make good for the use of the moneys come to her hands is as fair to her as any of the other methods to be adopted for such purpose. A guardian may be dealt with in this way as well as any other trustee: *Mathew v. Brise*, 14 Beav. at p. 346; Eversley on Domestic Relations, 2nd ed., pp. 584-5.

Costs of appeal apportioned according to success—one-third to defendant and two-thirds to plaintiff.

As to the costs of the action, there did not appear to have been prior to the commencement of the action any demand of an account or any refusal of the defendant to account to the plaintiff. If an account had been rendered, it would not, looking at the result of the accounting in the Master's office, and the large surcharge established, have been satisfactory to or accepted by the plaintiff, and an action would have been necessary. The defendant, as guardian and administratrix, was entitled to have her accounts taken and to be allowed her costs, as between solicitor and client, of the ordinary proceedings for that purpose; but she should not get the costs occasioned by her failure to keep reasonably accurate entries or accounts of her dealing with the estate, nor by the inquiries into her improper dealings with and application of the trust estate and funds, and the costs incurred in these respects should be deducted from her costs. Similar order in this respect to that in *In re Honsberger*, 10 O. R. 521; see Judgment Book, No. 8, p. 125.

Judgment on further directions:

1. Declare the plaintiff entitled to the lands set out in the schedule B. to the report, subject to the defendant's dower, but free from all other claims, charges, or incumbrances, and to two-thirds of the personal estate and rents and profits and proceeds thereof in the defendants' hands, and to two-thirds of the unrealized assets of the estate set out in schedule E.

2. Direct that the said assets be realized and proceeds divided in above proportions, or if parties agree to division in specie, let such division be made.

3. Let defendant's costs be taxed as above, and amount deducted from the moneys in her hands upon adjustment of accounts.

4. Defendant to pay to plaintiff two-thirds of the remainder after deducting such costs, and upon such payment to be at liberty to deduct \$300 allowance for compensation from the amount otherwise payable by her. If the amount not paid by the defendant when ascertained, the plaintiff to be entitled to proceed for the whole sum, and in that event defendant not to be entitled to the deduction.

*J. C. Rykert and W. H. Blake*, for the defendant.

*Shepley, Q.C., and Gilleland*, for the plaintiff.

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[FERGUSON, J., 22ND SEPTEMBER, 1899.]

YOUNG v. RAFFERTY.

*Mortgage—Several parcels—Rights of owners of equity of redemption—Exoneration of one parcel—Purchaser—Volunteer.*

An appeal by the defendants John Connolly and Catherine Anastasia Hanley from the report of the Master at Berlin in a mortgage action.

The mortgage was made by Cornelius Connolly, since deceased, upon a farm comprising nearly one hundred acres. After the mortgage the defendant John Connolly purchased forty acres of the farm from the deceased, who conveyed to him by a deed containing the usual covenants. The defendant Catherine A. Hanley acquired six acres by devise from the deceased, and the defendant Francis Connolly, fifty-three acres by a similar devise. The deceased was the father of John and Francis and the grandfather of Catherine.

The Master found that the forty acres of the mortgaged lands belonging to the defendant John Connolly and the properties devised to the other two respectively were alike liable for the payment of the mortgage money due to the plaintiff upon his mortgage.

The appeal of the defendant John Connolly was upon the ground that he being a purchaser for value, and the

others volunteers, their lands were primarily liable for satisfaction of the mortgage debt.

The appeal of the defendant Catherine Anastasia Hanley was upon the ground that the portion devised to the defendant Francis Connolly was liable before hers, but this appeal was not pressed at the hearing.

*Held*, that the Master should have found that the lands devised to Francis and Catherine Anastasia were in the first place liable for the payment of the mortgage money, and that the forty acres belonging to John were, as amongst these three owners, liable only for the payment of such money in the event of the other two parcels proving insufficient to satisfy the mortgage money, and then only for the deficiency. The lands devised to Francis and those devised to Catherine Anastasia were in the same position as to liability to satisfy the mortgage, and in the event of a sale these two parcels, or a competent part thereof, should be first offered for sale, and if the purchase money realized should be sufficient to satisfy the claim of the plaintiff for principal, interest, and costs, the forty acres need not be sold at all, but in the event of their being a deficiency, such forty acres, or a competent part thereof, might be sold to satisfy such deficiency.

*Barker v. Eccles*, 17 Gr. 277, 281, *Fisher on Mortgages*, 5th ed., s. 1350, and *In re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461, referred to.

*W. H. Blake*, for the defendants John Connolly and Catherine Anastasia Hanley.

*Du Vernet*, for the defendant Francis Connolly.

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## IN CHAMBERS.

[FERGUSON, J., 25TH SEPTEMBER, 1899.]

REGINA v. NIXON.

*Criminal law—Procedure—Conviction for being an inmate of a house of ill-fame—Appeal to Quarter Sessions.*

Motion for a mandamus requiring the police magistrate for the city of Toronto to admit to bail the defendant,

Mary Nixon, now serving a sentence of sixty days in gaol under a conviction by the said magistrate for being an inmate of a house of ill-fame, as required by s. 880 of the Criminal Code, 1892, pending her appeal against her conviction to the Court of General Sessions of the Peace for county of York.

The magistrate was of the opinion that an appeal was not open to the defendant, and the sole question upon the motion was whether or not the right of appeal existed.

The defendant contended that the prosecution and conviction took place under the provisions of ss. 207 and 208 of the Code, which are in part XV., commonly spoken of as the Vagrancy Act.

*Held*, that the prosecution was under the provisions of s. 783, and the conviction under s. 788, which are in part LV. of the Code. In such a case as this, s. 784 provides that the jurisdiction of the magistrate is absolute and does not depend upon the consent of the person charged to be tried by the magistrate, and that such person shall not be asked whether he or she consents to be so tried.

The right of appeal is given by s. 879, which, as well as the sections following it, which point out the manner of conducting the appeal, is in part LVIII. Section 808, which is in part LV., provides that the provisions of part LVIII. shall not apply to any proceedings under part LV.

By 58 & 59 V. c. 40, s. 782 of the Code, which shews what the expression "magistrate" in part LV. means and includes, is amended by adding a sub-section providing that when the defendant is charged with any of the offences mentioned in paragraphs (a) and (f) of s. 783—(f) being the one defining the charge in this case—any two justices of the peace sitting together be added to the list of persons falling within the meaning of the expression "magistrate" as used in part LV.; and the amendment also provides that when any offence is tried by virtue of the sub-paragraph an appeal shall lie from the conviction in the same manner as from summary convictions under part LVIII. This affords an indication that Parliament had it in mind

that an appeal did not before lie in cases where the prosecution was for an offence defined by s.-s. (a) or (f) of s. 783; and the appeal in such cases lies now only where the case is heard and determined by two justices of the peace sitting together.

However that may be, this prosecution having taken place under s. 783, and not under the part known as the Vagrancy Act, by reason of the provisions of s. 808 an appeal is precluded.

*Gibson Arnoldi*, for the defendant.

*J. W. Curry*, for the magistrate.

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[ROSE, J., 20TH SEPTEMBER, 1899.]

*In re* GIBBONS.

*Married woman—Funeral expenses—Separate estate.*

An application by George Ganderton, of Philadelphia in the state of Pennsylvania, for payment out of the estate of Mabel E. Gibbons, deceased, now being administered in Ontario under letters of administration granted to one Johnston Wilkinson, of the town of Sarnia, of the funeral expenses of the deceased incurred by the applicant.

The deceased left her surviving her husband, John P. Gibbons, and one child, an infant. Shortly after her death her husband left Philadelphia and went to parts unknown. He was said to be insolvent, and it appeared that there was no property out of which this claim could be made save a house and lot in the town of Sarnia belonging to the deceased at the time of her death. There was no personal contract between the husband and the undertaker, so far as appeared, and the sole question for determination was whether a friend who undertook the responsibility of seeing that the wife was properly buried should bear the expense, or whether it should come out of her estate.

*Held*, that there was no reason why, when a married woman dies seized of separate estate, that estate should



not be charged with her funeral expenses, as well as when a man dies leaving an estate.

American Law of Administration, vol. 2, para. 762; Crawley's Law of Husband and Wife, p. 55; Eversley's Law of Domestic Relations, 2nd ed., p. 276; *McClellan v. Filson*, 44 Ohio St. at pp. 188-191; and *In re McMyn*, 33 Ch. D. 575, referred to.

Order made as asked. Costs of all parties out of estate.

*C. J. Holman*, for the creditor.

*J. Hoskin*, Q.C., for the administrator and infant.

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## MANITOBA.

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### In the Queen's Bench.

[FULL COURT, 16TH MAY, 1899,

REGINA v. CROSSEN.

*Justice of the peace—Jurisdiction—Summary trial—Election—Criminal Code, s. 786—Certiorari.*

Motion to make absolute a rule *nisi* for a certiorari.

The defendants were convicted by two justices of the peace for having resisted a peace officer in the execution of his duty, and fined.

The grounds of the application were that the justices did not comply with s. 786 of the Criminal Code, 1892, and did not ask the defendants whether they would elect to take a speedy trial before the justices or be sent for trial by a jury; the justices proceeding summarily to hear the case without asking the defendants whether they wished to be tried by a jury or not; and that the justices exceeded their jurisdiction in inflicting a fine and costs and in default imprisonment at hard labour.

*Held*, that the writ of certiorari should be charged on the ground that the offence charged came within s. 783 (e) of the Criminal Code and subsequent sections, and that the

defendants could not have been tried summarily except after compliance with s. 786 of the Code, notwithstanding the provisions of s. 144.

Counsel for the Crown then stated he would consent to the conviction being quashed, and an order was made accordingly, without costs, and protecting the justices from any action in respect of the proceedings.

*Culver*, Q.C., for the defendants.

*Patterson*, for the justices and the Crown.

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## Supreme Court of Canada.

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EXCHEQUER COURT.

[8RD OCTOBER, 1899.]

### REGINA v. BLACK.

*Crown—Suretyship—Postmaster's bond—Penal clause—Lex loci contractus  
—Negligence—Laches of Crown officials—Release of sureties.*

In an action by the Crown, on the information of the Attorney-General for Canada, upon a bond executed in the Province of Quebec, in the form provided by the Act respecting the security to be given by the officers of the Crown in Canada, 31 V. c. 37, 35 V. c. 19, and the Post Office Act, 38 V. c. 7:—

*Held*, STRONG, C.J., dissenting, that the right of action under the bond was governed by the law of the Province of Quebec.

*Held*, further, that such a bond was not an obligation with a penal clause within the application of Arts. 1131 and 1135 of the Civil Code of Lower Canada.

*Held*, also, that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute.

*Exchange Bank of Canada v. The Queen*, 11 App. Cas. 157, referred to.

Judgment of the Court below, 6 Ex. C. R. 236, ante 184, affirmed.

*Hogg*, Q.C., and *Madore*, for the appellants.

*Fitzpatrick*, Q.C., S.-G., and *Newcombe*, Q.C., for the respondent.

ONTARIO.]

## ROWAN v. TORONTO R. W. CO.

*Jury—Findings—Interpretation of—Negligence—Contributory negligence—Street railways—New trial—Evidence.*

On the trial of an action against a street railway company for damages in consequence of injuries received through negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question, "Could Rowan, by the exercise of reasonable care and diligence, have avoided the accident?" the answer was "We believe that it could have been possible."

*Held*, reversing the judgment of the Court of Appeal, 18 Occ. N. 130, that this answer did not amount to a finding of negligence on the part of the plaintiff as a proximate cause of the accident which would disentitle him to a verdict.

*Held*, further, that, as the other findings established negligence in the defendants which caused the accident, which amounted to a denial of contributory negligence; as there was no evidence of negligence on the plaintiff's part in the record; and as the Court had before it all the materials for finally determining the questions in dispute; a new trial was not necessary.

*Aylesworth*, Q.C., and *James Ross*, for the appellant.  
*Osler*, Q.C., for the respondents.

## TOWNSHIP OF LOGAN v. TOWNSHIP OF McKILLOP.

*Ditches and watercourses—Owner of land—Declaration of ownership—Award—Defects—Validating award—57 V. c. 55; 58 V. c. 54.*

A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ditches and Watercourses Act, 1894, of Ontario.

*Township of Osgoode v. York*, 24 S. C. R. 282, followed.

If the initiating party is not really an owner, the filing of a declaration of ownership under the Act will not confer jurisdiction.

Section 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the Judge, or after it is affirmed on appeal, shall be binding, notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceeding under the Act where the party initiating the latter is not an owner.

Judgment of the Court of Appeal, 25 A. R. 498, 18 Occ. N. 394, reversed.

*Shepley*, Q.C., for the appellants.

*Garrow*, Q.C., and *F. H. Thompson*, for the respondents.

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QUEBEC.]

#### WHITE v. CITY OF MONTREAL.

*Municipal corporation—Assessment—Montreal harbour improvements—Special taxes—Widening streets—Construction of statute—57 V. c. 57—52 V. c. 139.*

A by-law passed in 1889 under the Quebec statute 52 V. c. 79, s. 139, provided for a special loan in aid of the Montreal harbour improvements, and appropriated \$163,750 “for the construction of a tunnel,” including the opening of the approaches—42 feet wide from Craig street in a line with Beaudry street—passing by the side of W.’s land, and subsequently another by-law was passed to open, alongside this roadway, an additional high level road, 35 feet in width, to give accommodation from Craig street to Notre Dame street, above the tunnel, which increased the width of this extension of Beaudry street, at the line of Craig street, to 77 feet, of which 42 feet constituted an open approach to the tunnel, and the remainder the high level roadway. The latter by-law provided that a portion of the expense should be paid by the parties interested and benefitted thereby as for local improvements made by the “widening” of Beaudry street. Upon proceedings taken to quash the second by-law the Superior Court held that the assessment was authorized and legalized by the first section of a Quebec statute passed in 1894, 57 V. c. 57, and this judgment was affirmed by the Court of Review.

*Held*, reversing the decisions of both Courts below, that, notwithstanding the reference to "existing rolls," application of the Acts of 1894 should be restricted to the cost of the "widening" only of the streets therein named in cases where there were existing rolls prepared by the commissioners fixing the limits for that purpose, and these words could not have the effect of extending the nature and character of works executed so as to include works manifestly forming part of the harbour improvement scheme, chargeable against the special loan.

*Trenholme*, Q.C., and *Beique*, Q.C., for the appellant.

*Atwater*, Q.C., and *Ethier*, Q.C., for the respondents.

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REGINA v. PACAUD.

*Crown—Insolvent company—Construction of road by new company—Subsidies—Payment of claims by Crown—Action to recover moneys paid—Transfer by payee.*

A company formed for the construction of a subsidized railway having failed, another company undertook to complete it, and the Government of Quebec agreed to pay all the actual debts against the road out of the unearned subsidies. A., the contractor of the former company, presented a claim for \$175,000, which was approved and paid, whereupon A. paid over \$100,000 of the amount to P. for services performed in organizing the new company and obtaining payment of the claim. The Government afterwards brought an action against P. to recover back the \$100,000 on the ground that A.'s claim was fictitious and was paid on false representations.

*Held*, reversing the judgment of the Court of Queen's Bench, that the action must fail if it could not have been maintained against A.; that the onus was on the Crown of proving A.'s claim fictitious; and that the Crown had not only failed to satisfy such onus, but the evidence clearly established the claim to be a just and reasonable one.

*Held*, further, that the payment to A. with consent of the existing company was a discharge to the Government

*pro tanto* of the subsidy due to the company, and if wrongfully paid, the latter only could recover it back.

*Held*, also, that, even if the Crown could have recovered the amount from A., it could not succeed against P., who, as the record showed, had ample reason for believing that the company was indebted to A. as alleged.

*Fitzpatrick*, Q.C., S.-G., and *O'Gara*, Q.C., for the Crown.

*Hutchinson*, for the defendant.

[18TH OCTOBER, 1899.]

### BEACH v. CORPORATION OF STANSTEAD.

*Municipal corporations—Certificate for liquor license—Refusal to confirm—Discretion—Good faith—Action for damages.*

In an action against a municipal corporation for damages claimed on account of the council of the municipality having, as alleged, illegally refused to confirm a certificate to enable the plaintiff to obtain a provincial license to sell liquors by retail:—

*Held*, affirming the judgment below, Q. R. 8 Q. B. 276, that the municipal council had a discretion under the provisions of the Quebec License Law, R. S. O. Art. 839, to be exercised in the matter of the confirmation of such license certificates for the exercise of which no action would lie, and further, that even if there had been evidence of want of good faith and malice upon the part of members of the municipal council, an action for damages could not lie against the municipal corporation.

*Brown*, Q.C., for the appellant.

*Trenholme*, Q.C., and *Leet*, Q.C., for the respondents.

NEW BRUNSWICK.]

[3RD OCTOBER, 1899.]

### REGINA v. TROOP

*Appeal—Certiorari—Merchants Shipping Act, 1854—Distressed seaman—Recovery of expenses—"Owner for time being"—Proof of ownership and payment.*

An appeal lies to the Supreme Court of Canada from the judgment of a Provincial Court making absolute a rule

*nisi* for a *certiorari* to bring up proceedings before a police magistrate under the Merchants Shipping Act with a view to having the judgment thereon quashed.

Section 213 of the Merchants Shipping Act, 1854, makes the expenses of a seaman left in a foreign port, and being relieved from distress under the Act, a charge upon the ship, and empowers the Board of Trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being."

*Held*, affirming the judgment of the Supreme Court of New Brunswick, that the latter words mean the owner at the time of action brought.

*Held*, further, that a certificate of the assistant-secretary of the Board of Trade that such expenses were incurred and paid is sufficient proof of payment under the Act, though the above section does not provide for a mode of proof by certificate.

Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding, or remedy under the repealed Act, in proceedings under the Merchants Shipping Act of 1854 proof of ownership of a ship may be made according to the mode provided in the Merchants Shipping Act, 1894, by which the former Act is repealed.

Under the Act of 1894 a copy of the registry of a ship registered in Liverpool certified by the Registrar-General of shipping at London is sufficient proof of ownership.

*Quære*—Where the Merchants Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will *certiorari* lie to remove the proceedings into a Superior Court?

*Newcombe*, Q.C., for the appellant.

*A. L. Palmer*, Q.C., for the respondent.



## ONTARIO.

## Supreme Court of Judicature.

## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., MEREDITH, J., 17TH FEBRUARY, 1896.]

## SKAE v. MOSS.

*Trial—Jury notice—Striking out—Duty of Judge presiding at jury sittings  
—Transfer to non-jury list—Discretion—Appeal.*

An appeal by the plaintiffs from an order of MEREDITH, C.J., made by him when presiding at a sittings at Toronto for the trial of actions with a jury, of his own motion, striking out the plaintiffs' jury notice and transferring the action to the non-jury sittings.

The appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and MEREDITH, JJ., on the 17th February, 1896.

*C. Millar*, for the plaintiffs, contended that the Chief Justice was not the trial Judge when he made the order, as the case had not then been called for trial, and he had no power to call up a case out of its turn and strike out the jury notice without the request of either party. The case was one proper for trial by jury, being an action against solicitors for improperly investing moneys.

*McCarthy*, Q.C., for the defendants.

THE COURT held that the Judge presiding at the Assizes had power to make such an order under the circumstances mentioned, and following *Brown v. Wood*, 12 P. R. 198, that the exercise of his discretion should not be interfered with.

Appeal dismissed with costs to the defendants in any event. Leave to appeal refused.

[This decision is opposed to that of another Divisional Court in *Bank of Toronto v. Keystone Fire Insurance Co.*, 18 P. R. 113, 18 Occ. N. 217, rendered on the 4th May, 1898.]

[MEREDITH, C. J., ROSE, J., 9TH OCTOBER, 1899.]

GALLAGHER v. GALLAGHER.

*Appeal—County Court—Interlocutory order—Order discharging defendant from custody under a ca. sa.*

An appeal by the plaintiff from an order of the Judge of the County Court of Frontenac discharging the defendant from arrest under a *ca. sa.* in an action in the County Court.

When the appeal came on for hearing on the 6th September, 1899, *C. J. McCabe*, for the defendant, asked to have the hearing adjourned.

THE COURT raised the point that the order appealed against was not in its nature final, but merely interlocutory, and therefore no appeal lay.

*Kilmer*, for the plaintiff, contended that the Judge had no power to make an order discharging the defendant except under the Indigent Debtors Act: *Gossling v. McBride*, 17 P. R. 585. The order must, therefore, be taken to have been under that Act, and if so, it was an order in its nature final.

*Cur. ad. vult.*

THE COURT felt bound by *McPherson v. Wilson*, 13 P. R. 339, and *Baby v. Ross*, 14 P. R. 440, to hold that the order appealed against was not in its nature final; and quashed the appeal with costs as of a motion to quash.

[BOYD, C., FERGUSON, J., 14TH OCTOBER, 1899.]

RONDOT v. MONETARY TIMES PRINTING CO., OF CANADA.

*Interpleader—Refusal of application by sheriff—Claimant—Appeal—Summary decision—Question of fact—Rule 1111—Abandonment of seizure—Issue—Re-seizure.*

Where an application was made by a sheriff for an interpleader order in respect of goods seized by him under an execution against the plaintiff for costs, and claimed by the brother of the plaintiff as purchaser of the goods, the Judge, assuming to act under Rule 1111, decided the question in

favour of the claimant, without directing the trial of an issue, and made an order refusing the application, directing the sheriff to withdraw from possession of the goods, ordering the execution creditors to pay the sheriff's costs and possession money and the claimant's costs, and directing that no action should be brought by the claimant against the sheriff in respect of the seizure.

*Held*, that the execution creditors had the right to appeal against this order.

The execution creditors did not dispute the claimant's title to the goods by purchase from one to whom they were sold by the plaintiff's assignee for creditors, but contended that the claimant's present professed ownership was a mere sham and a fraud contrived to enable the plaintiff to carry on business independently of the demands of his creditors.

*Held*, that the question presented was not one of law, but of fact, and an issue should have been directed.

But, the sheriff having relinquished possession of the goods pending the appeal, it was too late to direct an issue; and, unless the parties could agree upon one, the proper course would be for the execution creditors to seize again.

*King*, Q.C., for the execution creditors.

*W. R. Riddell*, Q.C., for the claimant.

*C. A. Moss*, for the sheriff.

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[FERGUSON, J., 5TH OCTOBER, 1899.]

#### STEWART v. FERGUSON.

*Appeal—Master's report—Time—Cross-appeal—Rule 769—Mortgage—Redemption—Interest post diem—Excessive payment—Application on principal—Mistake.*

According to the true meaning of Rule 769, each party is precluded from appealing against the report or certificate of a Master unless he serves his notice of appeal within the fourteen days mentioned in the Rule; and notice of appeal given in proper time by one party does not prevent the report from becoming absolute as regards another party.

A mortgage having properly borne interest at eight per cent. during its currency, and this having been regularly paid, the parties went on after the mortgage fell due, the one paying and the other receiving the eight per cent. for a long period, in ignorance that the liability was to pay only six per cent. Seven annual payments of interest were thus made after the maturity at the mortgage rate, and subsequently some payments at a lower rate, the mortgage money not being called in meantime. Both parties were ignorant of the law on the subject, and believed that the mortgage rate would continue until payment of the principal.

*Held*, that the money could not be recovered back by the mortgagor as money paid under a mistake, nor could the excess of interest be applied in reduction of the principal sum in a redemption action.

*Rogers v. Ingham*, 3 Ch. D. 351, followed.

*J. Bicknell*, for the plaintiffs.

*A. Millar*, Q.C., for the defendant.

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[STREET, J., 28TH SEPTEMBER, 1899.]

### CITY OF KINGSTON v. ROGERS.

*Assessment and taxes—Seizure for rent—Seizure for taxes—Goods in custodia legis—R. S. O. c. 224, s. 135.*

*Held*, that s. 135, s.-s. 1, of the Assessment Act, R. S. O. c. 224, which provides that the collector may levy for arrears of taxes "upon the goods and chattels wherever found within the county belonging to or in the possession of the person who is actually assessed for the premises," etc., does not authorize the collector to levy upon goods which are already in custodia legis, as goods under seizure by a bailiff for arrears of rent due a landlord.

*J. McIntyre*, Q.C., and *D. M. McIntyre*, for the plaintiffs.

*W. F. Nickle*, for the defendant.

## IN CHAMBERS.

[BOYD, C., 21ST OCTOBER, 1899.]

*In re* HYDE v. CAVEN.

*Prohibition—Division Court—Committal of judgment debtor—Non-payment of instalments ordered—Means of payment—Salary of Dominion officer—Question of fact—Process—Execution—Contempt.*

An application by the defendant for prohibition to the 1st Division Court in the county of Perth to prohibit the enforcement of an order for the committal of the defendant for contempt of Court in disobeying an order (upon after-judgment summons) requiring the defendant to make certain monthly payments upon a judgment recovered against him by the plaintiff. The Judge in the Division Court found that the defendant had no other other income out of which payment could be ordered than his salary as a collector of Inland Revenue. The Judge also found that the defendant had ample means to make the payments. It was argued that, as the salary of a public officer of the Dominion was exempt from execution or legal process, it could not be reached in this way, which was more obnoxious to the effective service of the officer than direct attachment, as it might subject him to compulsory detention from the duties of his office.

*Held*, that, despite any considerations of public policy, there was jurisdiction to deal with the application under the Division Courts Act, and prohibition did not lie. It was a question of fact within the Judge's jurisdiction whether the income of the defendant would permit such a deduction as would answer the instalments, leaving enough for proper maintenance. The inquiry was as to "sufficient means and ability"—very general language, not limited by any investigation as to the source of supply. Apart from this aspect of the case, the order complained of was not so much by way of execution, whether qualified or otherwise, as it was of a punitive character, according to *Stonor v. Fowle*, 13 App. Cas. 20.

Motion dismissed with costs.

*W. H. Blake*, for the defendant.

*J. H. Moss*, for the plaintiff.

## TAYLOR v. ROBINSON

*Sale of land—Distribution of proceeds—Priorities—Execution creditors—Solicitor—Charging order—Effect of new Rule of Court.*

On the 1st September, 1897, the Rule was passed by which the Court was enable to order that land recovered by the exertions of a solicitor should be charged for his benefit: Con. Rule 1129. Prior to this no such power existed as to land.

This action was begun by the solicitors for the plaintiffs on the 3rd June, 1896, and judgment was obtained declaring the plaintiffs' right to the land on the 27th October, 1896, but directing a reference for an account, etc.

The execution against the plaintiffs for the recovery of the official guardian's costs in another action was issued against their lands and placed in the sheriff's hands on the 29th April, 1897, at which time the accounts were being taken in the Master's office. After a year had elapsed, and after a sale could be had under the execution, the Court in this action gave judgment on further directions, on the 8th November, 1898, directing a sale of all the lands—the plaintiffs having only a fractional interest therein. A motion being made to restrain a sale under the execution, that was ordered, on account of the larger sale to be had in this action, after which the rights of all parties to the proceeds were to be adjusted.

*Held*, that, on this state of facts, the execution bound the plaintiffs' interest in the lands from the 29th April, 1897, at a time when no charge on the lands was possible in favour of the solicitors. The subsequent enactment of the Rule did not operate to divest the charge or to postpone the prior claim of execution creditors to the subsequently acquired equity of the solicitors to the discretionary intervention of the Court. The charge under the execution must precede the solicitors' lien, which was of subsequent origin: see *Goodfellow v. Gray*, [1899] 2 Q. B. 498.

After payment to the plaintiffs and of the other charges for commission and disbursements, which would leave a balance of \$758 in Court, the next payment in order would

be to the first execution creditor who seized, and whose levy was intercepted by the Court, but without prejudice to his rights. That right of priority for full payment is secured by s. 26 of the Creditors' Relief Act, R. S. O. c. 78.

It was agreed that other executions against lands came in before the 1st September, 1897, and as to these there should be ratable distribution of the balance pursuant to the Act, though not necessarily by the sheriff. It might be carried out either by the Clerk in Chambers or the Master at Chatham on the usual notices to creditors.

*Atkinson*, Q.C., for the defendant Robinson and the sheriff of Kent.

*H. W. Mickle*, for the plaintiffs' solicitors.

*A. J. Boyd*, for the official guardian.

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[ROSE, J., 14TH SEPTEMBER, 1899.]

*In re* SCHUNK.

*Will—Widow—Specific bequest—Dower—Election.*

An estate amounting to over \$10,000 was, after a direction to pay debts and funeral and testamentary expenses, and after a specific devise of certain land, devised by the testator to his executors in trust to sell and convert into money, and out of the proceeds to pay to his widow \$3,000 for her own use absolutely, and to divide the remainder among certain nephews and nieces.

*Held*, that the widow was not put to her election, but was entitled to her dower in addition to the bequest.

*Marsh*, Q.C., for the widow.

*W. R. Cavell*, for the executors.

*W. R. Riddell*, Q.C., for the adult beneficiaries.

*F. W. Harcourt*, for the infant beneficiaries.

## NOVA SCOTIA.

## In the Supreme Court.

## IN CHAMBERS.

[TOWNSHEND, J., 25TH SEPTEMBER, 1899.]

*In re* MUTUAL LIFE INSURANCE CO.*Interpleader summons—Service out of the jurisdiction.*

An application to set aside an interpleader summons and the service thereof. The summons was granted by RITCHIE, J., *ex parte*, under Order 56, Rule 1 (a).

*H. H. MacKay*, for the applicant, contended that this Court had no power to grant an interpleader summons to be served out of the jurisdiction.

*Joseph A. Chisholm*, contra.

TOWNSHEND, J.—The corresponding English Order 57 has frequently come up for consideration in the Courts. In *Credits Gerundense v. Van Weede*, 12 Q. B. D. 171, the Court consisting of Pollock, B., and Lopes, J., gave leave to serve such a summons, but in a later case, *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, [1891] 3 Ch. 451, Stirling, J., quoted, as governing service out of the jurisdiction, the observations of Cotton, L.J., in *Re Busfield*, 32 Ch. D. a p. 131, as follows: "Service out of the jurisdiction is an interference with the ordinary course of law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid, but apart from statute, a Court has no power to exercise jurisdiction over any one beyond its limits."

Mr. Piggott, in his work on service out of the jurisdiction, adopts the view thus expressed, and holds that where there is no statute, service cannot be made, nor should an



order for that purpose be granted: p. 144. In the Annual Practice, 1898, a similar view is stated by the learned editors.

While not binding on me, these authorities exhibit the present views of the profession in England.

It is clear that originating summonses could not be served out of the jurisdiction in the absence of a rule authorizing this to be done.

While there are certainly authorities for the opposite view, I come to the conclusion that I should follow the more recent deliverances on the subject.

[See a similar case in Ontario, *In re Confederation Life Association and Cordingly*, ante 305, 313. But this is now before the Court of Appeal.]

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[30TH SEPTEMBER, 1899.]

### VICKERS v. BOYD.

*Pleading—Assault—Defence—Justification—Particulars.*

An application by the plaintiff to strike out a paragraph of the statement of defence as embarrassing. The action was for an assault, and the defendant pleaded that he was "a duly appointed policeman for the town of North Sydney, and in the course of his duty arrested the plaintiff, and did not use more force than was necessary to effect such arrest." This was pleaded as a defence to the whole statement of claim.

*Held*, that the paragraph must be struck out with costs as embarrassing and as being no answer to the action. It is not the duty of policemen to arrest except for cause, and the defence, being one of justification, must shew all facts necessary to justify the act of assault.

. *D. McNeil*, for the plaintiff.

*W. H. Fulton*, for the defendant.

## GOODWIN v. FADER.

*Interim injunction—Patent—Undertaking to keep account.*

An application by the plaintiff for an interim order restraining the defendant from manufacturing and selling an article alleged to be covered by the plaintiff's patent.

*Congdon*, for the plaintiff.

*McCoy*, Q.C., for the defendant.

TOWNSHEND, J.—The patent is a very recent one, and the Court does not readily interfere in this way when there is a serious question to be tried out as to the validity of the patent. The course of the Court, under such circumstances, on an application for an injunction is, on the defendant undertaking to keep an account, not to make an order. I am further influenced by the fact that a trial may be had at an early date.

If, therefore, the defendant gives an undertaking to keep a strict account of his sales, and is also prepared to go to trial at Chambers in the usual way, if the plaintiff applies to the Chambers Judge for that purpose, or, if not, at the ensuing sittings, I will make no order in this case; but, if the defendant fails to give both undertakings within three days from notice of this decision, the plaintiff will take an order granting an injunction until the trial. Costs in the cause.

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[20TH OCTOBER, 1899.]

*In re* MARSHALL.

*Parent and child—Custody of infant—Religious faith—Conduct of parent—Estoppel.*

On the application of Thomas E. Marshall, a writ of habeas corpus was granted, directed to the Rev. Robert Laing, director in charge of the Halifax Ladies' College, requiring him to bring into Chambers Nellie Marshall, daughter of the applicant, alleged to be illegally detained in that institution. In obedience to the writ Mr. Laing produced Nellie Marshall at Chambers, on Wednesday and Thursday the 20th and 21st

September, 1899, and an application was made by her father for delivery over of her person to him, in support of which affidavits on behalf of the father, as well as Mr. Laing, were read.

It appeared from the affidavits that Thomas E. Marshall married Laura Logan in March, 1880, and that Nellie Marshall was one of the children of that marriage; that the wife was a Presbyterian, and that without objections on the part of the husband the child was baptized and brought up in the Presbyterian faith; in fact he in no way interfered with her religious training during her mother's lifetime.

The mother died in British Columbia, to which province Thomas E. Marshall, his wife, and family removed in 1890. Her death occurred in 1897, and on her deathbed the husband, in the presence of Annie Logan, her sister, and at his wife's request, agreed that Nellie and her brother should go back to Nova Scotia with Annie Logan, to be brought up under her care. Annie Logan was also a Presbyterian, which was known to Marshall.

After the wife's death Nellie accompanied Miss Logan to Halifax, and remained with her, her mother, and brother, for over a year. During that time she continued to attend the Presbyterian church and Sunday school, and finally became a member of that church. Miss Logan stated that she consulted the father about the child while she remained with her as to her welfare generally, and that he always approved of what she was doing; that there was no secrecy maintained as to her religion or attendance at Sunday school and church; and that Marshall did not at any time give any instructions to her on the subject of Nellie's religion, although he knew she was attending the Presbyterian church and Sunday school. He also visited his daughter, but gave no direction or advice as to her church attendance, of which she stated she believed he had knowledge.

The child first knew that her father was a Roman Catholic when, on his return from British Columbia, he took her to visit, before his marriage, his present wife, who was a Roman Catholic. Previous to that time, to her knowledge, he did not regularly attend the Roman Catholic church when they were.

living in British Columbia, nor did he say anything to her on the subject of religion until after the second marriage, after returning again from British Columbia in 1898.

He then requested her to come to Truro to live with him on a farm which he had bought. According to her statement, although she strongly remonstrated, he insisted on her attending the Roman Catholic service in Truro, and then informed her that she must choose between doing so or being sent to a convent, where she would be under strict rule; that, being much worried and frightened, she finally consented to go with him, after being advised that he could compel her to do so, and in the belief, as she had been told, that when fourteen years of age she could choose for herself. The father then caused her to sign a paper to that effect. She says that she had no intention of abandoning her faith in agreeing to this, but merely did so to smooth matters over until she should be fourteen.

In August, 1899, she became fourteen, and shortly after left her father's house and went to the house of a relative, and finally was placed in the Ladies' College at Halifax by her aunt, Miss Logan, where she was now being educated at her uncle's expense. She was most anxious to remain there, and to continue a member of the Presbyterian church, and the affidavits showed that her moral, mental, and physical condition would be greatly injured were she compelled to go back to her father.

The father substantially admitted the truth of these statements, but said he had no intention of abandoning his parental control; he merely allowed his children to go with their relatives as the best he could do for them until he had a home of his own; he disclaimed any intention of using force or compulsion in regard to her religious views, desiring however that she should be instructed in the Roman Catholic faith.

*B. Russell, Q.C., and R. E. Finn, for the applicant.*

*W. B. A. Ritchie, Q.C., and J. A. McKinnon, for the respondent.*

TOWNSHEND, J.—According to the English common law, there can be no doubt that the right of the parent to the control and custody of his daughter and direction of her

religious education continues until the age of sixteen. If no other considerations could legitimately come before me, my duty would be clear to order the return to the care of the father. [Reference to *Regina v. Howes*, 3 E. & E. 332; Nova Scotia Judicature Act, R. S. c. 104, s. 13, s.-s. 8, as to following the rules of equity; *In re Agar Ellis*, 24 Ch. D. 317; *Regina v. Gynghall*, [1893] 2 Q. B. 232.]

I have personally seen Nellie Marshall, and at some-length conversed with her on the subject. I find her to be a young girl of much intelligence, thoroughly understanding her position, and most pronounced in her religious views. While expressing proper regard for her father, she is unalterably opposed to his religious faith. She expressed the greatest dread of being compelled to return to his house, even for a period, as it could only result in great unhappiness and misery, and possible injury to her health. She is devotedly attached to her aunt and uncle, with whom she has been brought up since she was a mere child, and desires most earnestly to remain under their care.

In view of these facts, and in the light of the authorities cited, I can come to but one conclusion—that it would not be for the welfare of this young girl to order her return to her father's home. It would be a serious shock to her, both mentally and physically, resulting, so far as I can give an opinion, in great and unnecessary unhappiness to the young girl. I so decide on this ground, and, in viewing the whole circumstances, I think the father's conduct from the first to the time of his second marriage was such as to bring about the very conditions of which he now complains. He permitted his child to be brought up in a faith different from his own, which was reasonable in view of his first wife being a Presbyterian, and now he seeks, to suit his own caprice, to make her change that faith in which she has been educated, and to take her away from those relatives who are dear to her, and that at an age when her feelings and convictions have been settled and confirmed. The Court will lend no assistance to the father in such a case. He must abide by the consequences of his own indifference to his children's faith when their ideas were being formed and matured.

I have not been unmindful of several other questions discussed in the course of the argument, but the points on which I have placed my judgment are decisive, and the others require no comment.

In conclusion, I propose to adopt the course pursued in the case last mentioned: that on the uncle, Herbert Logan, giving an undertaking to provide for the young girl's support and education during her minority, no order will be made.

Under the circumstances there will be no costs.

[See *In re O'Reilly*, ante 323.]

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### In the County Court.

#### IN CHAMBERS.

[JOHNSTON, Co.C.J., 8TH OCTOBER, 1899.]

#### NETTING v. PATON.

*Settlement of action—Discontinuance—Practice—Claim of plaintiff's solicitor.*

An application by the plaintiff's solicitor on the record to set aside a discontinuance filed by the plaintiff, after a settlement of the action by a compromise arrangement between the plaintiff and defendant, without collusion, but yet without the knowledge of the plaintiff's solicitor, and after the cause was at issue. The plaintiff had settled on the assumption that his solicitor had agreed to accept \$15 for the conduct of the whole action, and the defendant's solicitor produced an affidavit from the plaintiff that such an agreement had been made. The plaintiff's solicitor denied this, and his story of the transaction was accepted as more probable.

*Held*, that the plaintiff could not discontinue after delivery of defence without the leave of the Court or a Judge, and Order 26, Rule 2, prevented the parties from settling, as the case had not been entered for trial. The discontinuance was set aside, and the defendant's course pointed out

to be either to enter for trial, when one party may withdraw upon payment of the other's costs, and go to trial on the merits, or to tax costs up to the date of settlement, when the Judge will order a discontinuance.

*J. J. Power*, for the plaintiff's solicitor.

*R. Robertson*, for the defendant.

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## BRITISH COLUMBIA.

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### In the County Court.

[BOLE, LOC.J., 27TH SEPTEMBER, 1899.]

REGINA v. AH DOCK.

*Criminal law—Gaming—Conviction—Evidence—Criminal Code, ss. 199, 703.*

An appeal by the defendant from his conviction by the stipendiary magistrate at Chilliwack for playing an unlawful game in a common gaming-house.

By s. 703 of the Criminal Code: "It shall be *prima facie* evidence in any prosecution for keeping a common gaming-house, under section 198 of this Act, that a house, room, or place is used as a common gaming-house, and that the persons found therein were unlawfully playing therein—(a) if any constable or officer authorized to enter \* \* \* is wilfully prevented from or obstructed or delayed in entering the same or any part thereof; or (b) if any such house \* \* \* is found fitted or provided with any means or contrivance for unlawful gaming," etc.

The point for decision was whether the provisions of s. 703 applied to this prosecution, which was brought under s. 199—"Every one who plays \* \* \* in a common gaming-house is guilty of an offence," etc.—for all the evidence given was conceded to be evidence not admissible against the defendant save under s. 703.

BOLE, LOC. J.—No authority has been cited to the Court in favour of the prosecutor's contention, and, as I entertain a

grave doubt whether s. 703 applies to the present case, I feel that, following the dicta in *Hull Dock Co. v. Browne*, 2 B. & Ad. 59, *Foley v. Fletcher*, 28 L. J. Ex. 106, *Davis v. Carr*, 1 Ex. D. 484—see also *Regina v. France*, L. R. 7 Q. B. 83—the benefit of the doubt should be given to the subject, and against the Legislature, which has failed to explain itself; for it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty: per Lord Abinger in *Henderson v. Sherborne*, 2 M. & W. 239.

I think, therefore, the appeal must be allowed and the conviction quashed, but, as the appellant has not even suggested a defence upon the merits, without costs.



## Supreme Court of Canada.

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EXCHEQUER COURT.]

[24TH OCTOBER, 1899.]

### YULE v. THE QUEEN.

*Constitutional law—B. N. A. Act, s. 111—Franchise before Confederation—  
8 V. c. 90—Liability of province—Arbitration—Condition precedent.*

A toll-bridge, with its necessary buildings and approaches, was built and maintained by Y. at Chambly in the Province of Quebec, in 1845, under a franchise granted to him by an Act of the Province of Canada, 8 V. c. 90, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use, and that Y. or his representatives should then be compensated by the Crown, provision being therein also made for ascertaining the value of the works by arbitration and award.

*Held*, affirming the judgment of the Exchequer Court of Canada, 6 Ex. C. R. 103, 18 Occ. N. 228, that the claim of the supplicants for the value of the works at the time they vested in the Crown, on the expiration of the fifty-years franchise, was a liability on the late Province of Canada coming within the operation of s. 111 of the British North America Act, 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial.

*Attorney-General for Canada v. Attorney-General for Ontario*, [1897] A. C. 199, followed.

*Held*, also, affirming the decision below, that the arbitration provided for by s. 3 of 8 V. c. 90 did not impose the necessity of obtaining an award as a condition precedent, but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not

have resorted to the present remedy by petition of right, and that the suppliants' claim for compensation under the provisions of 8 V. c. 90 was a proper subject of petition of right within the jurisdiction of the Exchequer Court of Canada.

*Newcombe, Q.C., for the Crown.*

*Laflour, Q.C., and R. V. Sinclair, for the suppliants.*

ONTARIO.]

### LEWIS v. ALLISON.

*Deed—Construction—Description—Party wall—Tenants in common.*

M., owner of two warehouses, numbers 5 and 7, divided by a party wall, executed a deed by way of marriage settlement on his daughter of number 5, describing it by metes and bounds in such a way as not to include any portion of the wall, but supplementing such description by the words, "said property being known as the warehouse number 5, Wellington street west." The trustees having conveyed the property by the same description, and M. having died, his executors, as owners of warehouse number 7, brought an action to establish their title to an interest in the party wall.

*Held*, reversing the judgment of the Court of Appeal, that, as the surrounding circumstances clearly showed the intention of M. to convey the whole of warehouse number 5, the extent of the conveyance could not be limited by the words of description; and, as the wall was common to both properties, the estate of M. had an undivided moiety in the ground covered by it as tenant in common.

*Shepley, Q.C., for the appellants.*

*G. G. Mills, for the respondents.*

### FARQUHARSON v. IMPERIAL OIL CO.

*Water and watercourses—Riparian owners—Soil of stream—Dams—R. S. O. 1887 c. 121, ss. 1, 5—"Other obstruction"—Appeal from judgment of Divisional Court—Leave to appeal per saltum.*

By R. S. O. 1897 c. 120, s. 1, all persons are prohibited from preventing the passage of saw-logs and other timber

down a river, creek, or stream by felling trees or placing any other obstruction in or across the same.

*Held*, reversing the judgment of a Divisional Court of the High Court, 29 O. R. 206, 18 Occ. N. 135, that placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of logs was an obstruction under this Act.

In a previous term an appeal had been taken to the Court from an order made by Gwynne, J., in Chambers, granting leave to appeal *per saltum* from the judgment of the Divisional Court. The Court then held that no appeal could be taken from the order in Chambers, and dismissed it without pronouncing on the question of jurisdiction: *ante* 125.

*Held*, now, *per* Taschereau, J., that the appeal should have been quashed on such motion; that an appeal does not lie from the judgment of a Divisional Court; that, as the case could not have been taken to the Court of Appeal, leave to appeal *per saltum* could not be granted, and the order therefore could not confer jurisdiction.

*Aylesworth*, Q.C., and *Shaunessy*, for the appellant.

*Osler*, Q.C., for the respondents.

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#### JAMIESON v. LONDON AND CANADIAN L. & A. CO.

*Landlord and tenant—Mortgage—Lease—Assignment—Discharge—Abandonment of security—Liability of mortgagee.*

J. demised lands for a term of years, with a provision against assignment by the lessor without his consent. The lessor assigned the lease by way of mortgage, and the consent of J. was indorsed thereon. The mortgagee, in an action by J., was adjudged liable as assignee for payment of rent and taxes, and, the lessor having died insolvent, was about to register a statutory discharge of the mortgage, when J. brought an action claiming a declaration that it could not be discharged without his consent and an injunction to restrain the mortgagee from doing so.

*Held*, affirming the judgment of the Court of Appeal, 26 A. R. 116, *ante* 132, that under the Judicature Act the Courts

are bound to treat a mortgage, as Courts of equity have always done, as a mere accessory to the debt; that, the lessor having consented to the specific assignment, such consent included all such incidents as the law attaches to the covenants and agreements between the parties set forth in the deed, as well as the covenants and agreements themselves; one of such incidents being that, on repayment of the debt, the mortgagee would be obliged to re-assign the mortgaged lands; that the lessor could not prescribe the dealings between the parties as to the mortgage debt, and the mortgagee was free to release it if he chose; and that he did not require a further license from the lessor to do so.

*S. H. Blake, Q.C., and W. H. Irving, for the appellant.*

*Robinson, Q.C., and Strachan Johnston, for the respondents.*

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### ROBINSON v. PURDOM.

*Easement—Right of way—Limited grant—Colourable user.*

A right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect to any other property.

Judgment of the Court of Appeal, 26 A. R. 95, *ante* 77, affirmed.

*Purdom, for the appellant.*

*J. M. Glenn, for the respondent.*

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### COCKBURN v. IMPERIAL LUMBER CO.

*Water and watercourses—Timber—Saw Logs Driving Act, R. S. O. 1887 c. 121—Detention—Remedy—Arbitration and award.*

C. & Sons, in driving logs down Bear Creek, District of Nipissing, found them stopped by a drive in front belonging to the Imperial Lumber Company, which had reached their destination and were held in the stream until they could be transported to the mill by means of a jack ladder. The logs of C. & Sons were detained so long that they could not be

driven further that season, which caused considerable damage, and an arbitration was agreed on under the Saw Logs Driving Act, C. & Sons claiming damage for detention, and the company cross-claiming in respect to jams detaining another drive behind that of C. & Sons. The arbitrator disallowed the company's claim, and awarded C. & Sons some \$1,100 for unnecessary and unreasonable detention. In an action on the award the company pleaded that the arbitrator had given compensation for delay caused by the mere fact that their drive was ahead of the other, and the Court of Appeal so held and gave judgment in their favour on the ground that C. & Sons' only remedy was by breaking the jam.

*Held*, reversing the judgment, 26 A. R. 19, *ante* 61, that C. & Sons had also a remedy by arbitration under the Act; that the company had not made before the arbitrator the claim raised by the plea; and that they had failed to establish such plea on the trial.

*H. D. Gamble* and *H. L. Dunn*, for the appellants.

*Aylesworth*, Q.C., for the respondents.

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### GOLD MEDAL FURNITURE M'F'G' CO. v. LUMBERS.

*Landlord and tenant—Notice to quit—"Disposing" of premises—Provision for termination—Sale of premises—Parol agreement—Misrepresentation—Covenant for quiet enjoyment.*

A lease of premises used for a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises if necessary on receiving six months' notice. . . ."

*Held*, reversing the judgment of the Court of Appeal, 26 A. R. 78, *ante* 62, and that of ROSE, J., 29 O. R. 75, 18 Occ. N. 64, that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate.

*Held*, further, that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages, even if no sale

within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment.

*Watson*, Q.C., for the appellant.

*S. H. Blake*, Q.C., for the respondents.

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QUEBEC.]

[8RD OCTOBER, 1899.

LAFRANCE v. LAFONTAINE.

*Water and watercourses—Floatable waters—Water power—River improvements—Joint user—Easement—Estoppel—Acquiescence.*

In a petitory action by the plaintiffs for a declaration of title to a parcel of land on the bank of a floatable river, with certain water powers appurtenant, and the dams, mill-race, and privileges thereto belonging, free and clear from any servitude or right of co-ownership, it appeared that the proprietor of the land adjoining the plaintiffs' on the lower side had acquired it for manufacturing purposes, and for a number of years had taken his water power through a flume constructed on the river bank in continuation of the plaintiffs' mill-race, which brought the water from the dam to the plaintiffs' mills, and that, in several deeds and written agreements, there had been acknowledgments of the right of owners of the lower lands to use this water subject to the charge of defraying an equal share of the expense of keeping up the constructions incidental to the utilization of the water power, and that both proprietors had, for a number of years, contributed equally towards such expenses.

*Held*, affirming the judgment appealed from, that, whether the rights so recognized constituted a servitude or a right of co-ownership in the lands upon which the constructions had been erected, the plaintiffs had no exclusive right to the enjoyment thereof as against the owner of the lands, although they were absolute owners of the strip of land on which the construction had been made.

*Lafleur*, Q.C., and *Guillet*, for the appellants.

*Belcourt* Q.C., and *R. S. Cooke*, for the respondent.

[24TH OCTOBER, 1899.]

## HONAN v. THE BAR OF MONTREAL.

*Prohibition—Advocate—Bar of Province of Quebec—Discipline—Want or excess of jurisdiction—Irregular procedure—Domestic tribunal—Powers.*

In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him, which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witnesses had been examined upon oath, during the inquiry, and no notes in writing of the evidence of witnesses adduced had been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the general council of the Bar of the Province of Quebec.

*Held*, affirming the judgment appealed from, Q. R. 8 Q. B. 26, that the local council of the Bar of Montreal had jurisdiction to proceed with the inquiry in the interest of the profession, notwithstanding the withdrawal of the charge by the private prosecutor; that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the bar, is a matter over which the council of the bar had complete jurisdiction; and further, that a writ of prohibition does not lie to prevent the execution of a sentence of suspension pronounced by the council of a local section of the Bar of the Province of Quebec against a member of that section, where the corporation in the exercise of its disciplinary powers had acted within the jurisdiction given to it by statute; and that the omission to preserve a complete record of the proceedings upon the inquiry of the council in the matter or to take written notes of the evidence of witnesses adduced constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition.

*McDougall*, Q.C., for the appellant.

*Globensky*, for the respondents.

## REGINA v. POIRIER.

*Landlord and tenant—Conditions of lease—Construction of deed—Practice—Objections taken on appeal for first time.*

Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court of Canada comes too late and cannot be entertained.

Where a written lease of lands provides for the payment of indemnity to the lessees in case they shall be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim the indemnity upon being so dispossessed, although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the conditions therein mentioned.

Judgment of the Court below affirmed.

*Duffy*, Q.C., and *Cannon*, Q.C., for the appellant.

*Fitzpatrick*, Q.C., S.-G., and *Marechal*, for the respondent.

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GRENIER v. THE QUEEN.

*Government railway—Death resulting from negligence of fellow-servant—Common employment—Lord Campbell's Act—Widow and children—Right of action—Bar—Measure of damages—Contract limiting liability.*

Article 1056, C. C., embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act.

*Robinson v. Canadian Pacific Railway Co.*, [1892] A. C. 481, distinguished.

A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act.

*Griffiths v. Earl Dudley*, 9 Q. B. D. 357, followed.



In s. 50 of the Government Railways Act, R. S. C. c. 38, providing that "Her Majesty shall not be relieved from liability by any notice, condition, or declaration, in the event of any damage arising from any negligence, omission, or default of any officer, employee, or servant of the Minister," the words "notice, condition, or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow-servants.

*Vogel v. Grand Trunk R. W. Co.*, 11 S. C. R. 612, disapproved.

An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually \$6,000. In consequence of such contribution, a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant:—

*Held*, reversing the judgment of the Exchequer Court, 6 Ex. C. R. 276, *ante* 202, that the rule of the association was an answer to an action by his widow under Art. 1056, C. C., to recover compensation for his death.

The doctrine of common employment does not prevail in the Province of Quebec.

*Filion v. The Queen*, 24 S. C. R. 482, followed.

*Fitzpatrick*, Q.C., S.-G., and *Lafontaine*, Q.C., for the Crown.

*Hogg*, Q.C., for the respondents.

## ONTARIO.

## Supreme Court of Judicature.

## COURT OF APPEAL.

DIVISIONAL COURT.]

[14TH NOVEMBER, 1899.]

*In re* ROBERTSON AND CITY OF CHATHAM.

*Municipal corporations—Local improvements—Frontage system—Mode of assessment—Benefit—Appeal—Court of Revision—County Court Judge—Prohibition—R. S. O. c. 223, ss. 664-685.*

When a sewer is being constructed by a municipal corporation under the local improvement system, and land not fronting on the street in question is benefitted, as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of that class, and not according to the benefit received by the lots in that class *inter se*.

Judgment of a Divisional Court, 30 O. R. 158, *ante* 31, affirmed: BURTON, C.J.O., dissenting.

But, *held*, also, reversing that judgment, OSLER and MOSS, JJ.A., dissenting, that after the County Court Judge had, on appeal by an owner, taken a contrary view and altered the assessment, it was too late to obtain an order for prohibition.

*J. T. Small*, for the appellant.

*William Douglas*, Q.C., and *Aylesworth*, Q.C., for the respondents.

Boyd, C.,]

GREYSTOCK v. BARNHART.

*Evidence — Mortgage — Alteration — Presumption — Proof of execution—  
Registry Act—R. S. O. c. 136, s. 63.*

The production of the registered duplicate original of an instrument with the registrar's certificate indorsed thereon is, by virtue of s. 63 of the Registry Act, R. S. O. c. 136, *prima facie* evidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open.

Whenever it would be an offence to alter an instrument which has been completed, the legal presumption is that material alterations appearing on the face of the instrument were made at such a time and under such circumstances as not to constitute an offence.

Judgment of BOYD, C., reversed.

Watson, Q.C., and R. M. Dennistoun, for the appellant.

Shepley, Q.C., and G. M. Roger, for the respondent.

FERGUSON, J.]

SUTHERLAND-INNES CO. v. TOWNSHIP OF ROMNEY.

*Municipal corporations—Drainage—Debentures—Maintenance—Embanking  
work—Registration of by-laws.*

Section 83 of the Drainage Act, R. S. O. c. 226, directing that the time for payment of debentures issued for the cost of maintenance of a drainage work shall not exceed seven years, does not apply to debentures issued for the cost of extending, improving, or altering a drainage work, and the municipality has the same power to issue debentures as in the case of an original drainage work.

Because in the course of the construction of a railway work banks are formed with the spoil cast from the dredge, the work is not one within s.-s. 2 of s. 3 of the Drainage Act, R. S. O. c. 226; that sub-section relates to the reclamation of wet or submerged lands.

*Semble*, that the provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage works, and when such by-laws have been registered in accordance with the provisions of the Act, they cannot be set aside, even if originally *ultra vires*.

Judgment of FERGUSON, J., 18 Occ. N. 342, affirmed.

*Atkinson*, Q.C., for the appellants.

*Rankin*, Q.C., for the respondents.

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### ATKINSON v. CITY OF CHATHAM.

*Municipal corporations—Highway—Obstruction—Telephone pole—Indemnity.*

A telephone pole placed in the travelled portion of a highway is such an obstruction thereto as to constitute want of repair within the meaning of the Municipal Act, and when the municipal corporation having jurisdiction over the highway in question take no step for several years to compel the removal of the pole, they are liable in damages for an accident caused by it.

Judgment of FERGUSON, J., 20 O. R. 518, 18 Occ. N. 310, affirmed.

But the municipal corporation has a right of indemnity against the telephone company erecting the pole, notwithstanding their knowledge of and assent to the erection of the pole.

Judgment of FERGUSON, J., 29 O. R. 518, 188 Occ. N. 310, reversed.

*William Douglas*, Q.C., and *Aylesworth*, Q.C., for the defendants.

*M. Wilson*, Q.C., and *J. G. Kerr*, for the Bell Telephone Company.

*Atkinson*, Q.C., for the plaintiffs.

ROSE, J.]

EDMISON v. COUCH.

*Trust—Grant on condition—Enforcement—Revocation—Release.*

The owner of land, “in consideration of natural love and affection and of one dollar,” conveyed it to the defendants in fee, subject to a life estate in his own favour, and “subject to the payment thereout by the (defendants)” of certain sums to the plaintiffs; the deed being voluntary as to them. The deed contained a covenant by the defendants with the grantor to make the payments, and was executed by the grantor and the defendants. Seven months later the grantor conveyed the same land to the defendants in fee, for their own use absolutely, free from all incumbrances.

*Held*, that an irrevocable trust was created by the first deed in favour of the plaintiffs, and was enforceable by them, and that this trust was not affected or released by the second deed.

*Gregory v. Williams*, 3 Mer. 582, and *Mulholland v. Merriam*, 19 Gr. 288, applied.

Judgment of ROSE, J., reversed.

*Huycke*, for the appellants.

*F. M. Field*, for the respondents in the same interest.

*Riddell*, Q.C., and *A. J. Armstrong*, for the other respondents.

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ROBERTSON, J.]

[2ND OCTOBER, 1899.]

HUFFMAN v. TOWNSHIP OF BAYHAM.

TANNER v. TOWNSHIP OF BAYHAM.

*Municipal corporations—Highway—Obstruction—Negligence—Damages.*

A milk-stand built on a highway by an adjoining proprietor, and projecting slightly over the travelled way, is such an obstruction as to constitute want of repair within the meaning of the Municipal Act, and when such an obstruction exists for three years and the municipal corporation

having jurisdiction over the road in question take no steps to have it removed, they are liable in damages for an accident caused by it.

*Castor v. Township of Uxbridge*, 39 U. C. R. 113, considered and approved.

Quantum of damages for death of a child discussed.

Judgment of ROBERTSON, J., varied.

*Osler*, Q.C., and *T. G. Meredith*, for the appellants.

*D. J. Donahue* and *W. E. Stevens*, for the respondents.

STREET, J.]

[14TH NOVEMBER, 1899.

### NICOL SCHOOL TRUSTEES v. MAITLAND.

*Public schools—Union school section—Existence de facto—Alteration of boundaries—"Municipality concerned"—R. S. O. c. 292, ss. 42, 43.*

There was no proof of the formation of the union school section in question, but it was shown that for many years a lot in one township had been marked in the assessment roll as in a school section of the adjacent township, to which the taxes received in respect of that lot were paid; that in various reports and returns made by the school inspector the owner of the lot was treated as a ratepayer in respect of the school section of the adjacent township; that his children went to the school established there; and that in the township school map, prepared by the township clerk under the provisions of s.-s. 4 of s. 11 of the Public Schools Act, R. S. O. c. 292, the lot was marked as in the school section of the adjacent township:—

*Held*, that the evidence was sufficient to show that the union school section existed in fact, and that s. 42 of the Act applied to it, so that it must be deemed to have been legally formed.

History and object of that legislation discussed.

Proper corporate description of the trustees of a union school section pointed out.

A municipality in which there is any territory forming part of the union school section in question, is concerned,

within the meaning of s. 43 of the Act, in any proceedings for the alteration of the section, and these proceedings must be based upon a petition of five ratepayers of this municipality, though not necessarily of ratepayers in the territory itself.

Judgment of STREET, J., affirmed.

*E. F. B. Johnston*, Q.C., and *A. H. Macdonald*, Q.C., for the appellants.

*Riddell*, Q.C., and *Hugh Guthrie*, for the respondents.

#### DRAINAGE REFEREE.]

#### CRAWFORD v. TOWNSHIP OF ELLICE.

*Municipal corporations—Drainage—Mandamus—Notice—Damages—Drain insufficient to carry off water.*

To entitle a person who or whose property is injuriously affected by the condition of a drain to a mandamus for the performance of such work as may be necessary to put the drain in proper condition, the notice required by s. 73 of the Drainage Act, R. S. O. c. 226, while not necessarily in technical form, must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under s.-s. (a) of that section.

A letter referring to defects in the drain, and suggesting steps to be taken, but not calling upon the municipality to do specific work, is not sufficient.

The notice by which proceedings are initiated in Court cannot be regarded as a notice under s. 73.

Judgment of the Drainage Referee affirmed.

A person who or whose property is injuriously affected by the condition of a drain is entitled to recover from the municipality charged with the duty of maintaining it such damages as he sustains by reason of its non-repair, whether

caused by the flooding of his land by the waters of the drain, or by its failure to carry off the water which came upon the land in the course of nature.

Judgment of the Drainage Referee reversed.

*Mabee*, Q.C., for the appellants.

*M. Wilson*, Q.C., for the respondents.

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[POLICE MAGISTRATE, TORONTO.]

### REGINA v. TORONTO RAILWAY COMPANY.

*Constitutional law—Justice of the peace—Stated case—Court of Appeal—R. S. O. c. 91, s. 5.*

A case can be stated by a justice of the peace under R. S. O. c. 91, s. 5, for the judgment of the Court of Appeal, only when the constitutional validity of the statute in question is involved, and not when the decision depends merely upon whether the statute is or is not applicable to the defendants.

It was held, therefore, that an appeal would not lie from the decision of the police magistrate for the city of Toronto that the Toronto Railway Company were bound by a by-law of the city corporation, passed under the authority of the Municipal Act, directing them to put vestibules on their cars, the company contending that the by-law and the Municipal Act did not apply because their line crossed the lines of Dominion railways, thus making their undertaking a work for the general advantage of Canada and subject only to Dominion regulations.

*James Bicknell*, for the defendants.

*Irving*, Q.C., for the Attorney-General for Ontario.

*Fullerton*, Q.C., for the complainants.



## HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., 18TH OCTOBER, 1899.]

McSHANE v. TORONTO, HAMILTON, AND BUFFALO  
R. W. CO.*Negligence—Injury to infant—Dangerous article near highway—Trespasser*

The plaintiff, a boy of twelve, entered upon railway property and took a fog signal out of a box on a hand-car standing there, which he struck with a stone and exploded, injuring himself.

*Held*, that, as the boy was a trespasser, the defendants were not liable.

*Barnes v. Ward*, 9 C. B. 392, distinguished.

*Smith v. Hayes*, 29 O. R. 283, 18 Occ. N. 134, followed.

Judgment of ARMOUR, C.J., affirmed.

*Lynch-Staunton*, for the plaintiff.

*D'Arcy Tate*, for the defendants.

[ARMOUR, C.J., FALCONBRIDGE, J., 10TH NOVEMBER, 1899.]

*In re* SOLICITORS.

*Solicitor—Bill of costs—Delivery—Taxation—R. S. O. c. 174—Employment  
Transaction of business—Foreign estate—Scope of business—Agreement  
—Benefit to solicitor—Public policy—Inherent jurisdiction.*

The jurisdiction granted by the provisions of the Act respecting solicitors, R. S. O. c. 174, to order the delivery of a bill of fees, charges, or disbursements for business done by a solicitor as such, is distinct from and independent of the jurisdiction thereby granted to order the same to be taxed; and there is power to order delivery of a bill whether it has been paid or not, and whether or not it is one which the Court would have power to refer to taxation.

*Duffett v. McEvoy*, 10 App. Cas. 300, *Re West*, [1892] 2 Q. B. 102, and *Re Baylis*, [1896] 2 Ch. 107, followed.

Where the employment of a solicitor is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, the Court will exercise its summary jurisdiction over him.

*Re Aitkin*, 4 B. & Ald. 47, followed.

Solicitors in Ontario being employed to transact business in relation to a claim of their client upon an estate in England:—

*Held*, that they were employed because they were solicitors, and the business was within the scope of the business of solicitors, and it made no difference that the estate was in England, for they were employed in Ontario and the business was transacted there.

*Held*, also, that an agreement that the solicitors should retain \$500 as commission for business done and to be done could not stand in the way of the taxation of the solicitors' bill, for such an agreement is against the policy of the law, and solicitors cannot enter into any stipulation on the terms of getting a better benefit than they would get by the costs which they are entitled to charge. The agreement was void as being for business done and to be done, and upon taxation it should be disregarded.

*Held*, lastly, that the Act respecting solicitors did not deprive the Court of its inherent jurisdiction over solicitors as officers of the Court.

See R. S. O. c. 174, s. 56; *Storer v. Johnson*, 15 App. Cas. 203.

*W. H. Blake*, for the solicitors.

*F. S. Mearns*, for the client.

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[ARMOUR, C.J., 9TH OCTOBER, 1899.]

***In re* PATTULLO AND TOWN OF ORANGEVILLE.**

***Municipal corporation—Arbitration and award—Costs—Legal discretion—***  
***R. S. O. c. 223, s. 460.***

An arbitrator appointed to determine a subject directed by s. 437 of the Municipal Act, R. S. O. c. 223, to be determined by arbitration, is given power by s. 460 "to award the

payment by any of the parties to the other of the costs of the arbitration or of any portion thereof," such costs being thus placed in the discretion of the arbitrator.

*Held*, that this discretion must be a legal discretion, and the arbitrator should be governed by the rule laid down in many cases with respect to a like discretion, namely, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court cannot take away his right to costs. And there being nothing in this case to warrant any departure from the rule that the unsuccessful party should bear the whole costs of the litigation, the award was modified accordingly.

*Myers*, Q.C., for the applicant.

*A. A. Hughson*, for the corporation.

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[MEREDITH, C.J., 15TH JULY, 1899.]

GOLDIE AND McCULLOCH CO. v. BANK OF HAMILTON.

*Fire insurance—Mortgage—Reconstruction of machinery in mill—Rights of first and second mortgagees and of person furnishing the new machinery—Fixtures—Marshalling insurance moneys—Subrogation.*

The owner of a mill property mortgaged it, together with the articles of machinery in it, which were declared to be fixtures, deemed to be of substantial value, to W. Afterwards a second mortgage was made to the defendants. Both mortgages were made under the Short Forms Act, and contained covenants to insure, but the insurance moneys, under the policies effected on the property and machinery, were made payable to the first mortgagee. Subsequently the mortgagor, with the consent of the second mortgagee, but not of the first one, at all events not so as to prejudice his security, made a contract with the plaintiffs under which the plaintiffs placed new machinery in the mill, using, as the contract provided, such of the old machinery as was necessary to complete the equipment, and taking and removing such of the old as was not so required. On the mill and machinery being destroyed by fire and the insurances adjusted, the second

mortgagee paid off the first mortgagee's claim, and procured from him an assignment of his mortgage as well as of his interest in the policies.

*Held*, that the plaintiffs could not claim that by reason of their betterment of the machinery, which prior to the reconstruction thereof was deemed of substantial value, they were entitled to the insurance moneys thereon to the detriment of the first mortgagee's claim; but that they were so entitled as against the second mortgagee; and therefore, after the claim of the first mortgagee so acquired by the second mortgagee was satisfied, the plaintiffs were entitled to such insurance moneys to the extent of their claim.

Remarks on the effect of *Hobson v. Gorringe*, [1897] 1 Ch. 192, on the decisions in this Province as to fixtures.

*Riddell*, Q.C., and *H. E. Rose*, for the plaintiffs.

*Armour*, Q.C., and *Lees*, for the defendants.

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[FALCONBRIDGE, J., 21ST OCTOBER, 1899.]

### RICKETTS v. VILLAGE OF MARKDALE.

*Municipal corporations—Highway—Injuries to playing children due to defects—Liability of municipality.*

Children using a highway *merely* for the purpose of play are putting it to a use for which it was not intended, and cannot recover for injuries due to defects or obstructions; and an action brought by parents for the death of a child caused by being crushed between some timbers, while playing on them, which were negligently piled on the side of a road, was dismissed.

*A. G. Mackay*, for the plaintiffs

*J. V. Lucas* and *W. H. Wright*, for the defendants.

*W. J. Hatton*, for a third party.

[STREET, J., 24TH NOVEMBER, 1899.]

SMYLIE v. THE QUEEN.

*Crown—Timber licenses—Renewal—New regulations—"Manufacturing condition"—61 V. c. 9—Application to past sales—Powers of Provincial Legislature—Sale of public lands—B. N. A. Act, s. 92 (5).*

By C. S. C. c. 23 it was enacted, s. 1, that the Commissioner of Crown Lands might grant licenses to cut timber on the ungranted lands of the Crown, subject to such regulations as might from time to time be established by the Governor in council; and, s.-s. 2, that no license should be granted for a longer period than a year.

Regulations established by order in council in 1869 provided, *inter alia*, that license holders who had complied with all existing regulations should be entitled to have their licenses renewed on application to the Commissioner, and prescribed a form of license.

The licenses issued to the suppliants in 1873 and 1888, and annually renewed up to 1898, contained a clause—also found in the advertisement and conditions of sale—stating that the license was subject to the condition that the licensee should comply with all regulations "that are or may be established by order in council."

By order in council of 17th December, 1897, it was ordered that every license issued on or after the 30th April, 1898, should contain a condition that all pine cut under such license should be manufactured into sawn lumber in Canada.

By 61 V. c. 9 it was enacted, s. 1, that all sales of pine timber which should be thereafter made, and all licenses thereafter granted, should be so made or granted subject to the condition set out in the regulations of the 17th December, 1897; s. 2, that such regulations were approved; s. 3, that further regulations might be made; s. 4, that s. 1 should come into force on the passing of the Act, and the other parts on the 29th April, 1898.

The suppliants applied to the Commissioner for a renewal for the year 1898-9 of their licenses, without the insertion of the "manufacturing condition" above referred to, but this was refused.

It was admitted that the suppliants had complied with all former conditions in the licenses previously issued to them.

*Held*, that the suppliants were not entitled to renewals of their licenses free from conditions coming into force after the licenses originally issued to them.

2. Notwithstanding that s. 1 of 61 V. c. 9 was apparently applicable to future sales only, that Act, having regard to s. s. 2 and 4, applied to renewals of licenses issued upon sales made before it was passed.

3. That that Act was *intra vires* of the Ontario Legislature, being an enactment in relation to "the management and sale of the public lands belonging to the Province and of the timber and wood therein," within the meaning of s. 92 (5) of the British North America Act, and not to "the regulation of trade and commerce," within the meaning of s. 91 (2).

*Robinson*, Q.C., and *H. J. Scott*, Q.C., for the suppliants.

*S. H. Blake*, Q.C., and *Walter Gow*, for the Crown.

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### IN CHAMBERS.

[BOYD, C., 28TH NOVEMBER, 1899]

### STEVENSON v. STEVENSON.

*Alimony—Costs—Interim order—Disbursements—Undertaking.*

Notwithstanding the language of Rule 1144—"only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor"—an order may be made in an action for alimony for payment by the defendant to the plaintiff's solicitor of a sum to cover prospective witness fees, upon the undertaking of the solicitor to account for all sums not actually and properly disbursed.

*W. E. Middleton*, for the defendant.

*J. H. Moss*, for the plaintiff.

[FERGUSON, J., 8TH NOVEMBER, 1899.]

BARRIE PUBLIC SCHOOL BOARD v. TOWN OF  
BARRIE.*Parties—Joining plaintiffs without authority—Motion by defendants to strike out—Solicitor—Retainer—Sufficiency of—Corporate seal—Costs.*

Solicitors who began an action in the name of a public school board and an individual as plaintiffs were retained for the board by a special committee appointed by resolution of the board, not under the corporate seal; the purposes of the appointment, as stated on the face of the resolution, embraced the commencement of any action respecting the matters referred to and the employment of counsel, the subject of the action being one of such matters.

*Held*, that this was not proper authority from the school board to the solicitors to bring the action, and the defendants had the right to have the name of the board as plaintiff struck out.

*Town of Barrie v. Weaymouth*, 15 P. R. 95, followed.

The solicitors having acted in good faith and under the belief that their retainer was sufficient, no costs were awarded.

*A. E. H. Creswicke*, for the plaintiffs.

*Strathy*, Q.C., for the defendants.

## NOVA SCOTIA.

## In the Supreme Court.

[FULL COURT, 15TH MAY, 1899.]

## MURRAY v. KAYE.

*Arrest—Affidavit to hold to bail—Defect—Writ of summons—No indorsement for costs—Effect of.*

Decision of McDONALD, C.J., ante 116, reversed on appeal: see 32 N. S. Reps. 206.

*E. P. Allison*, for the defendant.

*W. E. Fulton*, for the plaintiff.

[25TH NOVEMBER, 1899.]

**McDONALD v. BROAD COVE COAL CO.***Appeal—Leave to adduce further evidence on—Form of order.*

An appeal had been taken to this Court by the defendant from a judgment of the County Court of District No. 6. An application was made by the defendant for leave to adduce further evidence on the appeal, which evidence had come to the defendants' solicitor's knowledge since judgment delivered in the action. The nature of the evidence to be given was indicated by affidavits, and its materiality made apparent. The following order was granted:

It is ordered that the defendants, upon paying into this honourable Court the amount of the debt and costs recovered herein, or filing a bond executed by two sureties in double the said amount (who shall justify) as security to the plaintiff pending the appeal be and they are hereby granted special leave to take the evidence of John E. Beaton, of Loch Leven, in the county of Inverness, farmer, before George O. Forsyth, Esquire, Commissioner of this honourable Court in and for the county of Inverness, at Port Hawkesbury in said county, on Friday the 1st day of December, 1899, at ten o'clock in the forenoon, which evidence the said Commissioner shall commit to writing and certify under his hand and return to the prothonotary of this honourable Court at Halifax, in the county of Halifax, forthwith.

It is further ordered that the defendants and plaintiff by their respective solicitors or counsel shall be at liberty to examine, cross-examine, and re-examine the said John E. Beaton, and that the evidence of the said John E. Beaton, when taken and returned as aforesaid, shall be printed and received on the argument of the appeal herein on behalf of the defendants, and that the costs of this application and the costs of taking the said evidence shall abide the further order of this Court.

*D. McNeil*, for the defendant.

*C. Ernest Gregory*, for the plaintiff.



## IN CHAMBERS.

[TOWNSHEND, J., 81ST OCTOBER, 1899.]

## BENJAMIN v. TURNER.

*Trial—Claim and counterclaim—Separate trial—Convenience—Expense—  
Change of venue.*

This was an application by the plaintiff for an order directing that the plaintiff's claim and defendant's counterclaim in the action be tried separately. The claim was to set aside a deed. The counterclaim was for damages for trespass to the land involved in the claim, as well as to other land, and damages for an illegal levy. The legality of the levy turned upon the ownership of the land in dispute. The place of trial was set for Halifax. The claim could be proved by two witnesses, according to affidavits of the plaintiffs, who could come to Halifax at very little expense, whereas about 70 witnesses would be required and a large amount of surveying would have to be done to defend the counterclaim, and the expense of bringing the witnesses many miles would be incurred.

*Held*, that the claim and counterclaim being such as might well and conveniently be tried together, the application would not be granted; but the venue would be changed to Windsor and the objection as to cost of witnesses thereby overcome.

*H. W. Sangster*, for the plaintiff.

*A. G. Morrison*, for the defendant.

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ROBINSON v. JONES.

*Judgment debtor—Examination of—Application to examine other persons in  
aid of execution.*

*Held*, that no person other than the judgment debtor himself, or, in case of a corporation, the officers thereof, can be examined in aid of execution under the provisions of Order 40, Rule 44, of the Judicature Act. Application for an order to examine a third party, the judgment debtor being out of the country, refused.

*Hawkins v. Snow*, 19 Occ. N. 116, followed.

[2ND NOVEMBER, 1899.]

*In re* FITZPATRICK.

*Liquor License Act—Licensed premises—Neighbourhood of railway—Prohibition of statute—Refusal of mayor to sign license—Mandamus.*

This was an application by John P. Fitzpatrick for a writ of mandamus to the mayor of the city of Halifax, directing him to sign an hotel license for the sale of intoxicating liquors on certain premises in the city. The mayor refused to issue such license, on the ground that the premises were within one hundred yards of a railway.

TOWNSHEND, J.—In order to dispose of the question whether the railway known as Cunard's siding comes within the prohibitory terms of c. 25 of the Acts of 1896, s. 6, I may say at once that, in my opinion, this extension of the Inter-colonial Railway is one contemplated by the Act.

The principal points argued relate to the action of the mayor in refusing to execute and issue the license, after the city council had by resolution granted a license to the applicant. Whether his action was justifiable, depends on the interpretation of the Liquor License Act and amendments thereto.

Chapter 2 of the Acts of 1895, s. 27, says: "Subject to the provisions of the next following section, no license shall be issued for the sale of liquors in any place situate within a distance of one hundred yards from any place of worship, public school, college, academy, seminary, or other institution of learning, or from the grounds connected therewith."

That section was amended by c. 25 of the Acts of 1896, s. 6, by extending the prohibition to "railways other than the street railways." Sub-section 2 of s. 27 made certain exceptions to these prohibitions, authorizing licenses to be granted to persons who had held licenses in such localities from the 15th April, 1891. The applicant did not come within this exception. But by c. 10 of the Acts of 1897, s. 3, a further exception was made, extending it to "premises which have been continuously licensed up to the 15th day of March, 1896, and which are not situate upon the same street as any place of worship, public school, college, academy, seminary,

or other institution of learning;" in such cases the council may continue to grant a license under the terms of this Act, for the sale of liquor upon the said premises; this shall not be held to affect in any way the provisions of s. 6 of c. 25 of the Acts of 1896.

It will be noticed that these last amendments, either by accident or design, omit "railways," and it is for this reason contended that the mayor was not justified in refusing to issue the license.

The only answer to this is that the concluding words left the prohibition as to "railways" in force. I think, on a fair construction of the original Act and the amendments, this contention must prevail. The result then is this, that the council could grant licenses within the prohibited districts in cases where the licensee had continuously held one from the 15th April, 1891, by s.-s. 2 of s. 27 of the Acts of 1895, and by the amendment of 1897 could do the same to premises continuously licensed up to the 15th March, 1896, provided in the latter case the premises are not within the prohibited distance. Assuming the applicant is within the distance, the council could not grant the license.

The remaining point is whether the mayor could refuse after the council had granted the license, even though within the prohibited limits. The provisions of the Act are of the most stringent character, in respect to the requirements before the council could act, and in respect to the inquiries which may take place before them before a license can be granted. The license inspector is called upon to make a detailed and minute report before they can act at all, and, even after that report and his recommendation, the council, of their own motion, may institute inquiries of their own, and hear the parties. In this case the inspector's report showed that all the conditions had been complied with, and the license was unanimously voted. It is, however, contended that the distance of the premises is not one of the matters on which the inspector is required to report, and there is nothing to show that he did so. Section 20 enumerates the contents of the report, and certainly the distance is not one of the elements.

It does not appear that the council had that question before them, but, assuming that they had, was it lawful for them to direct the issue of a license under such circumstances, and if they did, is it in the right of the mayor to refuse compliance?

I was strongly inclined at the argument to the view that the mayor could not legally refuse, inasmuch as the council were alone invested with authority to decide all matters, and his action is only ministerial. Subsequent consideration has led me to change my views, and I now hold that in granting the license to the applicant, the council exceeded their power. They were by statute positively prohibited from doing so, and the mayor knowing this was justified in withholding his signature to the license. If the distance was a matter left to their decision as a fact, or if the inspector had by law been required to report on the distance, and they had adopted his report, or even on other evidence had decided it, even though erroneously, I should have entertained grave doubts as to the propriety of the mayor's course. But such is not the case. It is made a positive objection to any license being granted by statute, and it was not in the council's power by granting the license to overcome the statute.

*Writ refused.*

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[24TH NOVEMBER, 1899.]

*In re* MARSHALL.

*Infant—Appointment of guardian in father's lifetime.*

After the decision rendered on the 20th October, 1899, in the matter of the custody of Nellie Marshall, an infant, 19 Occ. N. 364, a motion was made on behalf of her uncle for an order appointing him her guardian.

W. B. A. Ritchie, Q.C., and James McKinnon, for the applicant.

B. Russell, Q.C., and R. E. Finn, for the father, *contra*.

TOWNSHEND, J.—The father is still alive. Nothing has been suggested against his character, and I find no reason

for interfering with his parental rights, beyond the refusal to place the daughter under his control by the act of the Court. The circumstances were such as, in my opinion, and under the authorities, would not justify the Court, in view of the girl's welfare, in removing her from her present surroundings into his custody and control. I see no reason for further action on the part of the Court, and I do not think that in such a case as the present the Court should take the extreme step of appointing a guardian during the father's lifetime.

I will, therefore, make no order, but require an undertaking to be given as directed in my former judgment. No costs in the matter.

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[HENRY, J., 7TH NOVEMBER, 1899.]

MANN v. CRAGG.

*Particulars—Action for price of goods—Defence—Defects in goods.*

Application by the plaintiff for further and better particulars from the defendant of his defence of alleged defective construction, workmanship, and material in certain bicycles, for the price of which the plaintiff sued.

The particulars delivered were criticized on two grounds: first, that they involved an issue as to every part of the material and workmanship of the bicycles; and second, as being so general in their nature that they were not particulars at all.

*Held*, that the first objection was not tenable, because, if true, the fact that particulars cover every possible ground of objection is no reason why they should be restricted, while, if not true, the penalty for their comprehensiveness will be an appropriate disposition of the matter of costs.

*Held*, as to the second objection, that the defendant, having undertaken to give particulars, should state in what respect the bicycles were defective, as, for instance, as to shapes, strength, weight; should state in what respect he is

going to contend that the materials used were objectionable; and in what respect the machines were objectionable by reason of bad or inadequate workmanship.

*Joseph A. Chisholm*, for the plaintiff.

*F. B. Wade*, Q.C., for the defendant.

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MILLER v. ARCHIBALD.

*Pleading—Leave to reply—Time expired—Merits.*

Motion by the plaintiff for leave to reply, the period for reply having elapsed. Action for damages for conversion of a piano which was to have been paid for by instalments, and all instalments to count as rental or hire until, on the final payment being made, the vendor would transfer the title in "a piano"—not necessarily but usually the one hired. The defendant, the sheriff, levied, on the piano at the suit of a creditor of the hirer. The defendant by an amended defence paid \$1 into Court and admitted liability. The plaintiff now wished to take out the money and reply.

HENRY, J.—The action was commenced on the 12th November, 1898. E. J. Miller, or the plaintiff, his executrix—it does not appear when he died—had, not later than July previous, ceased to have any beneficial interest in the property in question. The cause was duly at issue upon the amended statement of defence before any intimation on behalf of the plaintiff was made as to even the probability of the money paid into Court being accepted. Although there was probably a technical right in the plaintiff to recover nominal damages, the action should not have been commenced, certainly not for the value of the property. This being so, it seems to me that I should refuse assistance to the plaintiff over the technical difficulty which stands in his way by reason of his not having replied within the ordinary time.

*H. C. Borden*, for the plaintiff.

*W. A. Henry*, for the defendant.

## STORRS v. CRAWLEY.

*Mortgage—Surplus proceeds of sale—Attaching creditor—Owner of equity—Impeaching conveyance to.*

This was an application by the defendant in a mortgage action, for payment of surplus proceeds of sale out of Court. The application was resisted by one Hennessy, an attaching creditor of the land sold under the foreclosure, who produced affidavits impeaching the bona fides of the conveyance of the land to the defendant, and setting out the following facts. One Wilson was the original owner. Wilson assigned to McDonald ostensibly for the benefit of creditors. McDonald did nothing under the assignment, and Franklin was appointed assignee. Wilson left the country to live in the United States, being indebted to Hennessy at the time. Franklin admitted to Hennessy that the assignment was made by Wilson merely to protect himself from his creditors and not for their benefit. Hennessy sued Wilson as an absent or absconding debtor and attached the land in question. Preceding his attachment in the Registry office was a deed from Franklin to Crawley. A deed from Wilson to Crawley was filed an hour and a half after the attachment. Crawley appeared for Wilson in Hennessy against Wilson and Storrs foreclosed. The deed of assignment to Franklin was bad on its face as containing a security trust in favour of Wilson.

*Held*, that under such circumstances the application must be refused at this stage, and the attaching creditor having expressed an intention to commence an action to set aside the assignment to Franklin and the latter's deed to Crawley, the matter must be indefinitely adjourned, and if the attaching creditor should commence such action within a reasonable time, the surplus proceeds must remain in Court until the determination of the same.

*Roscoe*, Q.C., for the defendant.

*D. McNeil*, for the attaching creditor.

## NEW BRUNSWICK.

## In the Supreme Court.

[FULL COURT, 18TH NOVEMBER, 1899.]

## NORTH AMERICAN LIFE ASSURANCE CO. v. ROSENBERG.

*Pleading—Action for insurance premium—Defence—Varying written agreement.*

The plaintiffs brought an action to recover \$28, the premium of insurance on a life policy for \$1,000 on the defendant's life, issued by the plaintiffs, and alleged that the defendant's application to the plaintiffs and the medical examiner's certificate of health were in writing. The defendant gave notice of defence, setting up thereby that it was agreed between him and the plaintiffs that he would insure his life with the plaintiffs for \$1,000 and pay the premium thereon, if the company would effect an insurance against loss by fire in some reputable fire insurance company for \$1,500 on the stock and goods of defendant and his partner, H., the defendant to pay the premium on the fire insurance policy, and alleging that the plaintiffs had failed to effect the fire insurance. On an application to the Judge of the York County Court the notice of defence was struck out, on the ground that the agreement set up by the notice was an attempt to vary a written, by a contemporaneous oral, agreement.

*Held*, on appeal, that the order of the Judge should be reversed, as what was set up by the defendant's notice was all one agreement, and that the written application and medical certificate was only a step in the performance of it, and not the agreement itself.

*Duffy*, for the plaintiffs.

*Barry*, Q.C., for the defendant.



## MACPHERSON V. McKEEN.

*Promissory note—Action on—Liability of indorser—Special agreement.*

This action was on a promissory note made by one R. for \$500 payable to the defendant on demand, on which R. had paid the defendant \$200. The defendant, the note being long overdue, transferred it by an unqualified indorsement to the plaintiff for \$100. The plaintiff sought to recover back the \$100, and contended on the trial that at the time of the transfer the defendant agreed to repay him the \$100 if he, the plaintiff, failed to realize the balance due on note and interest from R., which he had been unable to do. The defendant denied the alleged agreement, and alleged that he sold the note to the plaintiff for the \$100. The plaintiff was nonsuited on the trial.

*Held*, on appeal from the York County Court, that the nonsuit was right, and even if the plaintiff's contention as to the agreement was correct, he could not recover in an action on the note, but should have declared on the agreement.

*Duffy*, for the plaintiff.

*F. St. J. Bliss*, for the defendant.

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[17TH NOVEMBER, 1899.]

## ACKERMAN v. BOYD.

*Landlord and tenant—Creation of relationship—Taking possession under agreement to purchase—Tenant at will—Overholding Tenants' Act.*

The respondent entered into possession of certain lands of the appellant under an agreement to purchase. Default having been made in the payments agreed for, the appellant took proceedings before two justices of the peace under C.S. c. 83, s. 22, as amended by 43 V. c. 12, s. 1, to summarily eject respondent as a tenant at will. The justices made the order as authorized. On appeal the Judge of the York County Court reversed the order of the justices, holding that the relation of landlord and tenant as contemplated by the Act did not exist.

On appeal from this decision to the Supreme Court:—

*Held*, VANWART, J., dissenting, that the order of the justices was right and the order of the County Court Judge must be reversed.

*John R. Dunn*, for the appellant.

*Mortimer McDonald*, for the respondent.

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*Ex parte* DOHERTY.

*Canada Temperance Act—Imprisonment for offence against—Arrest—Escape—Re-arrest under same warrant.*

D. was convicted of a fourth offence against the second part of the Canada Temperance Act and sentenced to a term of imprisonment. A warrant of commitment was placed in the hands of L., a constable, for execution. L. arrested D. on the 16th September, and at D.'s request allowed him to go at liberty until the 18th on D. depositing with L. \$100 as security that he would on that date surrender himself to L. On the 17th it was agreed between L. and one McL., an attorney acting for D., that D. should be allowed his liberty until the 25th September, when he was to surrender himself to L. On the 25th D. refused to surrender himself to L., who re-arrested him, tendered him the \$100 deposit, and lodged him in gaol.

Application was made by D. for his discharge by habeas corpus on the ground that D., after a voluntary escape, could not be re-arrested on the same warrant.

*Held*, VANWART, J., dissenting, that the warrant was legal, and the application should be refused.

*Per* VANWART, J., that there is a distinction between voluntary and negligent escape. In the latter case the officer may re-arrest; in the former he cannot, on the same warrant. In this case the escape was voluntary, and D. should be discharged.

*Pugsley*, Q.C., for the defendant.

*McCully*, for the prosecutor.

*Ex parte DOAK.**Justice of the peace—Bias—Interest—Relationship.*

The applicant was convicted before one McA., a justice of the peace, for an assault upon his nephew, E. H. D., and fined. The information was laid before one T. P., a justice of the peace, who issued a warrant on which the applicant was arrested. T. P., on the day fixed for hearing, thinking he was disqualified by relationship to the parties, asked McA. to hear the matter. It was alleged that T. P. assisted the prosecution by asking questions and advising with McA. during the hearing and in making up his judgment.

The relationship was that T. P.'s mother was a half-sister to an aunt of defendant by marriage, and that T. P.'s father, after the death of his wife, married the said aunt.

It was contended that T. P. had no right to take the information and issue the warrant, and that, although McA. was called in, T. P. practically tried the case.

*Held*, that the relationship did not disqualify, and if T. P. had jurisdiction to hear the case, he could without impropriety assist McA.

*Rainsford*, for the prosecutor.

*O. S. Crockett*, for the applicant.

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**WHITTAKER v. TRAVELLERS INS. CO. OF HARTFORD.***Costs—Scale of—Amount in question—Offer of judgment—Acceptance.*

The plaintiff brought an action in the Supreme Court on an accident policy issued by the defendants, claiming \$100 for alleged injuries sustained and insured against. The declaration contained three counts. The defendants offered judgment for \$57 under s. 185 of the Supreme Court Act, limiting the offer to the first count. The offer was accepted. The clerk taxed the plaintiff's costs on the Supreme Court scale. The defendant applied for a review of taxation, contending that the plaintiff was entitled to costs only on the County Court scale, by virtue of s. 187 of the Act, as \$57 was a sum recoverable in the County Court.

*Held*, that the two sections must be read together, and that the clerk should tax one-half the costs of the writ on the Supreme Court scale and the other costs on the County Court scale.

*Miles B. Dixon*, for the plaintiff.

*C. G. Coster*, for the defendant.

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*Ex parte* WALLACE.

*Canada Temperance Act—Service of summons—Inmate of place of abode.*

The applicant was convicted of a violation of the second part of the Canada Temperance Act at Moncton, in the county of Northumberland.

Service of summons was made by leaving it with one T., a clerk in the hotel of which the applicant was reputed proprietor, and in which he resided. The accused did not appear.

*Held*, that the evidence did not show that T. was an inmate of the last or most usual place of abode of accused, as required by s. 562 of the Criminal Code, and that the convicting magistrate had no jurisdiction to enter upon the hearing in the absence of the accused.

*M. G. Teed*, for the applicant.

*W. B. Chandler*, for the prosecutor.

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*Ex parte* WETMORE.

*Assessment and taxes—Exemptions—Salary of servant of Provincial Government.*

The applicant moved for a certiorari to quash an assessment made in the city of Fredericton against him. The principal ground was that being a servant of the Provincial Government his salary was exempt from taxation.

*Held*, that the case of an employee of the Provincial Government was not analogous to that of a civil servant of the Federal Government, and he was not entitled to the exemption claimed.

*G. W. Allen*, Q.C., and *J. W. McCready*, for the applicant.

*Ex parte* GRANT.*Stipendiary magistrate—Fees of office—Resolution of town council.*

Grant applied for a mandamus to compel the stipendiary magistrate who presides over the City of Moncton Civil Court to issue a summons in a civil suit for the applicant without the legal fee therefor. The magistrate is paid a fixed salary by the town, and all fees received from the Civil Court are accounted for and paid over by the magistrate to the city treasurer, and form a part of the revenue of the city. The city council passed a resolution authorizing and requiring the magistrate to issue any papers required by any person without requiring payment of the fees fixed by law.

Grant applied for a summons, which the magistrate refused to issue without the payment of the legal fee.

*Held*, that the resolution was not binding on the magistrate, who was within his right in exacting the fee; and the rule was refused.

*Gregory*, Q.C., for the applicant.

*McKay*, the magistrate, in person.

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 IN EQUITY.

[BARKER, J., 19TH SEPTEMBER, 1899.]

## TRITES v. HUMPHRIES.

*Bill—Injunction suit—Affidavit—53 V. c. 4, ss. 23, 24—Administration suit—Administrator—Parties—Demurrer—53 V. c. 4, s. 54—Pleading—Probate Court—Jurisdiction to appoint administrator where no personal estate—Delay in suit to set aside fraudulent conveyance—Pleading shewing debt statute barred—Costs of demurrer.*

Under 53 V. c. 4, ss. 23, 24, a bill in an injunction suit need not be sworn to or supported by affidavit. It is only where an injunction is sought before the hearing that the bill must be supported by affidavit.

In a suit by simple contract creditors of an intestate to set aside as fraudulent, under 13 Eliz. c. 5, a conveyance by him of real estate, and for the administration by the Court of

the estate, an administrator of the intestate's estate appointed by the Probate Court is a necessary party to the suit, though there are no personal assets of the intestate.

The failure to make the administrator a party to such a suit is not a ground of demurrer, but may be taken advantage of under Act 53 V. c. 4, s. 54.

In such a suit it is not necessary for the plaintiff to allege that he has obtained or is in course of obtaining a judgment upon his debt. The Court will not in such a suit appoint a person under 53 V. c. 4, s. 89, to represent the estate of the intestate, instead of requiring an administrator of the intestate's estate to be made a party to the suit.

The Probate Court has jurisdiction to grant letters of administration where an intestate dies indebted possessed of real, but of no personal, estate.

Delay cannot be set up against a creditor seeking to set aside a conveyance of lands as fraudulent under 13 Eliz. c. 5, where the creditor's debt is not barred under the Statute of Limitations at the commencement of the suit.

In a suit commenced in 1899 by a creditor to set aside as fraudulent, under 13 Eliz. c. 5, a conveyance of land, the bill stated that the debt arose upon two promissory notes dated respectively in March and April, 1885, payable with interest three and twelve months after date; that the rates "were renewed and carried along from time to time by new or renewal or other notes, but have never been paid, but with interest thereon are still due to the plaintiff."

*Held*, that the allegations were too vague, general, and uncertain to show a valid and subsisting debt, not barred by the Statute of Limitations at the time of the commencement of the suit, and that the bill was therefore demurrable.

Where some of several grounds of demurrer were overruled, costs were not allowed to either side.

*M. G. Teed*, for the plaintiff.

*White, A.-G.*, and *L. Allison*, for the defendant.

[17TH OCTOBER, 1899.]

## ATTORNEY-GENERAL v. MILLER.

*Public officers—Validity of appointment—Remedy—Injunction—Quo warranto.*

The pilots for the district of Miramichi having resigned, the defendants were appointed pilots for the district by the Pilotage Commissioners. An injunction was sought to restrain the defendants from acting as pilots under licenses granted to them by the Commissioners, on the grounds (1) that their appointments were not made by by-law confirmed by the Governor-General in council and published in the *Gazette*, as required by the Pilotage Act, R. S. C. c. 80, s. 15; (2) that under that Act the Commissioners fixed by regulation a standard of qualification for a pilot, and that the defendants were not examined as to their competency; (3) that the defendants were not appointed at a regularly called meeting of the Commissioners, or by the Commissioners acting together as a body. A pilot appointed under the Act is appointed during good behaviour for a term not less than two years.

*Held*, that the office of pilot being a public and substantive independent office, and its source being mediately if not immediately from the Crown, and as the objections related to the validity of the defendants' appointments, and as there was no pretence that the appointments were made colourably and not in good faith, the remedy, if any; was not by injunction, but by information in the nature of a quo warranto.

*Pugsley*, Q.C., and *Tweedie*, Q.C., for the Attorney-General.

*Currey*, Q.C., and *Lawlor*, Q.C., for the defendants.

## MANITOBA.

In the Queen's Bench.

[BAIN, J., 20TH NOVEMBER, 1899.]

CARTER v. RODGERS.

*Evidence—Foreign commission—Agent of party—Procuring attendance at trial—Place of execution of commission—Expense.*

Appeal by the plaintiffs from an order of the Referee refusing a commission to take the evidence of one Stephenson in Montreal.

The affidavit in support of the application stated that the witness lived in Ontario; that he was a material and necessary witness for the plaintiffs; and that they could not safely proceed to trial without his evidence. Stephenson was a commercial traveller living in Toronto; while he acted as the plaintiffs' agent in the transaction out of which the action arose, he was not in their employment in the sense that they could insist on his coming to Manitoba, at any time, to give his evidence.

*Held*, that the plaintiffs were *prima facie* entitled to an order: *Armour v. Walker*, 21 Ch. D. 673; and as they had to examine other witnesses in Montreal, there would be no objection to Stephenson being examined there also, and that course would save expense.

Appeal allowed with costs to the plaintiffs in any event; costs below to be costs in the cause.

*Mulock*, Q.C., for the plaintiffs.

*Mathers*, for the defendant.



## BRITISH COLUMBIA.

## In the County Court.

[BOLE, Co.J., 18TH NOVEMBER, 1899.]

## DUNN v. HOLBROOK.

*Mechanics' liens—Validity of lien—Certificate of action commenced—Necessity for filing.*

Action to establish and realize a lien under the Mechanics' Lien Act.

The defendants objected that a certificate that the action had been commenced to realize the lien had not been filed, as required by s. 24 of the Act.

The validity of the lien depends, inter alia, upon: (a) The filing of a lien in the office of the Government agent, written thirty days after the completion or discontinuance of the work, in respect of which the lien is claimed: s. 8. (b) On the institution of proceedings to realize the lien. (c) The filing in the Land Registry office, etc., of a certificate of the Judge or Registrar of the Court, certifying that such action has been commenced; and such proceedings must be instituted and such certificate filed within thirty days after the filing of the lien, under s. 8, or the lien absolutely ceases to exist.

BOLE, Co. J.—It has been strenuously contended that the filing of this certificate is not a matter of substance or importance, and in no way affects the validity of the lien. I fear this contention cannot prevail against the distinct words of the 24th section, which, in clear language, declares that, if all the conditions of the section are not fulfilled, “-every lien shall absolutely cease to exist.” To decide against the plain and unmistakable words of the Act, would be entirely to ignore the rule laid down by Lord Blackburn in *Caledonian R. W. Co. v. North British R. W. Co.*, 6 App. Cas. 131; vide, also, *Regina v. Judge City of London Court*,

[1892] 1 Q. B. at p. 200, per Lord Esher; *Walsh v. Trebilcock*, 23 S. C. R. at p. 705; *Davis v. City of Montreal*, 27 S. C. R. 539; and as to necessity for strictly following the statutory mode of creating the lien, vide *Neil v. Carroll*, 28 Gr. 30, affirmed on appeal. p. 339; *Bank of Montreal v. Haffner*, 10 A. R. 592, 602; affirmed, Cas. Dig. 288; *McNamara v. Kirkland*, 18 A. R. 271.

“The statute does not give a lien, but only a potential right of creating it. \* \* \* It is quite clear that, when a statute gives a privilege in favour of a creditor, the creditor must bring himself strictly within its terms:” per Strong, J., in *Edmonds v. Tiernan*, 21 S. C. R. at p. 407. And, while I cannot help sympathizing with the plaintiff, I am not, on that account, at liberty to disregard the plain and positive provisions of the statute. I do not think, after a careful consideration of the evidence adduced and the authorities cited, that the plaintiff’s claim for a lien can be maintained, and judgment will be entered accordingly.

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### ELLIOTT v. McCALLUM.

*Mechanics’ liens—Validity of claim of lien—Affidavit—Commissioner—Solicitor.*

In a proceeding for the purpose of realizing a mechanics’ lien, objection was taken to the validity of the lien, upon the ground that the affidavit attached to the claim of lien filed was sworn before one Morrison, who was now the plaintiff’s solicitor.

*Held*, that the objection was not entitled to prevail.

*Vernon v. Cooke*, 49 L. J. C. P. 767, followed.

*Baker v. Ambrose*, [1896] 2 Q. B. 372, distinguished.

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NOTED, DIGESTED, AND REPORTED IN THIS  
VOLUME.

AND ALSO OF THE CASES PUBLISHED DURING 1899 IN THE OFFICIAL REPORTS  
OF THE SUPREME AND EXCHEQUER COURTS OF CANADA, AND OF THE  
PROVINCES OF ONTARIO, NOVA SCOTIA, NEW BRUNSWICK,  
MANITOBA, AND BRITISH COLUMBIA.

NOTE :—Where the number of a page only is mentioned, the reference is  
to the CANADIAN LAW TIMES Occasional Notes for 1899.

Oco. N.—*Canadian Law Times Occasional Notes.*

S. C. R.—*Supreme Court (of Canada) Reports.*

Ex. C. R.—*Exchequer Court (of Canada) Reports.*

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